14-16840

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF SILVESTER, et al.,

Plaintiffs-Appellees,

v.

KAMALA D. HARRIS, Attorney General of the State of California, in her official capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of California

No. 1:11-cv-02137-AWI-SKO
The Honorable Anthony W. Ishii, Judge

APPELLANT'S REPLY BRIEF

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JONATHAN M. EISENBERG
Deputy Attorney General

PETER H. CHANG
Deputy Attorney General
State Bar No. 241467
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5939
Fax: (415) 703-1234
Email: Peter.Chang@doj.ca.gov
Attorneys for Defendant-Appellant Kamala D. Harris, Attorney General of California

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INTRODUCTION

Appellant established, in her opening brief, that California's 10-day waiting period does not burden conduct protected by the Second Amendment because it is outside the scope of the Second Amendment as historically understood and is presumptively lawful. In their response, Appellees too narrowly construe *Heller*'s non-exhaustive categories of presumptively lawful firearm regulations and incorrectly suggest Appellant must identify exact Founding Era analogues to preserve the waiting period laws.

Appellant further established that, should the Court proceed to the "scrutiny" step of the analysis, California's important interests in public safety, preventing gun violence, and preventing prohibited individuals from obtaining firearms would be achieved more effectively if the 10-day waiting period to acquire a firearm is applied to all firearm purchasers, including subsequent purchasers.[1] Appellees, on the other hand, ignore the "reasonable fit" standard articulated by this Court in *Fyock*, *Jackson*, and *Chovan*, instead urge this Court to adopt a different articulation used in the First Amendment context. But Appellees offer no reason to depart from this Court's established case law for reviewing Second Amendment

[1] References to "subsequent purchaser" herein are to a prospective firearm purchaser who has (1) a transaction for at least one prior firearm acquisition listed in the Automated Firearms System (AFS) database, or (2) a valid conceal carry weapon (CCW) permit, or (3) both a transaction for at least one prior firearm acquisition listed in the AFS and a firearms certificate of eligibility (COE).

challenges. This Court should therefore reverse the District Court's Judgment, and may do so on any of these bases.

ARGUMENT

I. THE WAITING PERIOD LAWS DO NOT BURDEN CONDUCT PROTECTED BY THE SECOND AMENDMENT

The Waiting Period Laws[2] do not burden Appellees' Second Amendment rights because they fall outside the scope of the Second Amendment, as historically understood, and because they are presumptively lawful. The Court's analysis should thus stop at the "burden" step of the two-step analysis. AOB 23.

A. The Waiting Period Laws Fall Outside the Scope of the Second Amendment as Historically Understood

Appellees argue that the Waiting Period Laws fall within the scope of the Second Amendment, as historically understood, because a government-imposed waiting period for firearm purchase in the Founding Era was not identified to the District Court. ARB 25. Appellees misunderstand the governing rule as articulated by this Court.

For a regulation to fall outside the scope of the Second Amendment, it need not (though it could) have an exact Founding Era counterpart. Rather, a regulation falls outside the scope of the Second Amendment if it "'burdens *conduct* protected by the Second Amendment' based on a 'historical understanding of the scope of the Second Amendment right,'" or if it "falls within a 'well-defined and narrowly

[2] Cal. Penal Code §§ 26815, 27540.

limited' category of prohibitions 'that have been historically unprotected.'" *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (cert denied, 83 USLW 3449, U.S., June 8, 2015) (internal citations and punctuation marks omitted) (emphasis added). Thus, there need not be an exact Founding Era counterpart to the Waiting Period Laws for the Court to find that they fall outside the scope of the Second Amendment. The Court may determine the scope of the Second Amendment based on evidence of the understanding of the Founding Era voters. The District Court erred in requiring a Founding Era counterpart to the Waiting Period Laws and in failing to evaluate the historical evidence submitted by the Appellant in the correct context.

As evidence that the imposition of a waiting period falls outside the historical scope of the Second Amendment, Appellant cited two examples of governmental temporal restrictions on the use and possession of firearms that were historically accepted under the Second Amendment. Appellees offer no contrary evidence, instead disputing that the two examples are analogous to the Waiting Period Laws. Appellees' arguments fail.

First, early impressment laws are evidence that citizens of the Founding Era expected that the government could not only temporarily delay the provision of private firearms, but commandeer them. AOB 28-29. Appellees argue that it is "inconceivable" that a government requiring universal gun ownership for national

defense would have considered enacting a waiting period for firearm acquisitions.[3] ARB 27. Appellees, however, frame the issue incorrectly. The correct inquiry is not whether the government, for practical purposes, would have enacted a waiting period in 1791, but whether the government could have done so; *i.e.*, whether the Founding Era citizens would have deemed a waiting period to be an infringement of their Second Amendment right. The answer is no. AOB 27-32.

Second, laws in New York that regulated the temporal possession and usage of firearms stand as further evidence that Founding Era citizens would not have considered such temporal restrictions to be within the scope of the Second Amendment. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012); AOB 28-29.

The evidence of this Founding Era understanding of the scope of the Second Amendment is bolstered by evidence of the practical realities of everyday life in the Founding Era, which created a natural delay between the purchase and possession of a new firearm. AOB 30-31. Appellees argue that such realities must be disregarded because it is only government intrusion that defines the scope of the

[3] Appellees are referring to the Militia Act of 1792, which required "every free able-bodied white male citizen" between 18 and 45 years of age to be enrolled in the militia and to "provide himself with a good musket or firelock . . . or with a good rifle." 1 Stat. 271, § I. Even in this military context, the government provided each militia member six months after enrolling to acquire a firearm. *Id*. Thus, the Militia Act of 1792 corroborates Appellant's other evidence of the slower pace in the Founding Era.

Second Amendment right.[4] ARB 29. This is again premised on Appellees' erroneous assertion that for any modern firearm regulation to survive, it must have a Founding Era counterpart. Appellant has provided abundant evidence that the Founding Era citizens would not have expected immediate access to new firearms and thus would not have considered such access to be a "right" within the scope of the Second Amendment. AOB 29-31.

B. The Waiting Period Laws Are a Presumptively Lawful Firearm Regulation

The Waiting Period Laws are a presumptively lawful firearm regulation because they impose conditions on the commercial sale of firearms and also because they facilitate the prohibition on firearm acquisition by felons and the mentally ill. AOB 32-38.

Again missing the point, Appellees argue that if conditions or qualifications on the commercial sale of firearms are presumptively lawful, then all regulations short of a complete prohibition on possession would be permitted. ARB 30. Appellees' argument fails. As an initial matter, the issue of whether regulations imposing conditions or qualifications on the commercial sale of firearms are

[4] Without citing any support, Appellees appear to suggest citizens who did not live on the "frontier" could have obtained a firearm any time they wished. ARB 29, n.10. But the historical evidence submitted by Appellant shows that all citizens, including those in New York and New England, could not have expected immediate access to goods. Exh. B to MTTJN (Appellant's Motion to Take Judicial Notice) (Dkt. 25) at pp. 7, 9, 212-15.

presumptively lawful has been settled. The Supreme Court has said that they are. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008); *see* Brief of Amicus Curiae Brady Center to Prevent Gun Violence (Dkt. 31) at pp. 3-8. The only question is whether the Waiting Period Laws qualify as regulations that impose conditions or qualifications on the commercial sale of firearms. The District Court erred in determining that they are not. EOR 43.

The Waiting Period Laws impose only a brief temporal condition on the commercial sale of firearms as they apply to the delivery of a firearm by dealers in certain situations. The laws do not prohibit the sale of firearms or place barriers to acquiring them, and they do not apply to non-commercial private-party transfers that do not involve a dealer. For example, the Waiting Period Laws do not apply to the transfer of a firearm by gift or bequest between immediate family members. Cal. Pen. Code § 27875. And loans of firearms for less than 30 days between persons known to each other are also not subject to a waiting period. *Id.* § 27880.

As to prohibitions on firearm acquisition by felons and the mentally ill, again the constitutionality of such laws is not in doubt. *See Heller*, 554 U.S. at 627. Here, to be sure, the Waiting Period Laws are not themselves prohibitions, but what they do is afford sufficient time for the State to conduct the background check to determine whether the purchaser is a felon or mentally ill. The presumptive lawfulness of the prohibitions would be of little meaning if the

corresponding ability to determine whether a purchaser is prohibited were not also presumptively lawful.

The Waiting Period Laws also facilitate the prohibition on firearm acquisition by felons and the mentally ill by allowing for time to conduct straw purchase investigations.[5] Straw purchase investigations are not part of the computerized auto-approval process. If a firearm were released immediately after a firearm application (DROS application) is auto-approved, it would not provide the law enforcement agents sufficient time to conduct their investigations. EOR 137:1-12 (testimony of Bureau of Firearms (BOF) special agent Blake Graham); *see also* EOR 140:24-141:9, 144:5-22 (same).

The full 10-day waiting period also plays a crucial role in allowing late evidence of mental health holds or mental health confinements (so-called "5150's") and law enforcement alerts to be received and assessed by the BOF. Appellees' Supplemental Excerpt of Record (SER) 3:7-4:1 (testimony of BOF Assistant Chief Steve Buford); EOR 110:3-112:7 (same). By any measure, the Waiting Period Laws are well within the boundaries of the Supreme Court's admonition that the Second Amendment does not "cast doubt on longstanding

[5] Persons who seek to acquire firearms through straw purchasers are typically prohibited from acquiring firearms themselves or want to avoid being connected to those firearms. There would otherwise be no reason to make a straw purchase.

prohibitions on the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. The Waiting Period Laws are thus presumptively lawful measures both as conditions or qualifications on the commercial sale of firearms and as measures that facilitate the prohibition on firearm acquisition by felons and the mentally ill.

C. The Waiting Period Laws Are Presumptively Lawful as a Longstanding Regulation

Current firearm regulations may be deemed to be presumptively lawful, longstanding regulations if their historical prevalence and significance are shown. *See Fyock v. City of Sunnyvale*, 799 F.3d 991, 997 (9th Cir. 2015).

Appellees assert that *Chovan* forecloses any argument that 20th century gun regulations may be used to determine the historical scope of the Second Amendment. ARB 33. But Appellees overstate *Chovan*'s holding. In *Chovan*, this Court concluded that it was "not clear" that prohibition of firearm possession by domestic violence misdemeanants was longstanding because the first federal firearm restrictions regarding violent offenders were not passed until 1938, and "more importantly," those restrictions did not apply to domestic violence misdemeanants, as were at issue in that case. *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013)). Domestic violence misdemeanants were not restricted from possessing firearms until 1996. *Id.*

In contrast, California's 1923 waiting period applied to all purchasers, including subsequent purchasers, just as they do now.[6] SER 38. Thus, the long-standing application of a waiting period, applicable to all buyers not otherwise exempt, stretches back nearly a century. Additionally, as this Court observed in *Fyock*, a regulation can be deemed "longstanding" even if it cannot boast a Founding Era analogue. *Fyock*, 779 F. 3d at 997; *accord Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196-97 (5th Cir. 2012) (*BATFE*). "After all, *Heller* considered firearm possession bans on felons and mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage." *BATFE*, 700 F.3d at 196-97. Here, while the length of the waiting period has varied since the original 1923 enactment, more recently in relation to the BOF's technical capabilities, the application of the waiting period to subsequent purchasers is the same today as it was in 1923.[7] As a regulation that traces its roots back nearly a century, the Waiting Period Laws are longstanding, and presumptively lawful.

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[6] Beginning in 1991, the waiting period was applied to long guns in addition to handguns. EOR 19. But that change is irrelevant for purposes of this case.

[7] Appellees do not challenge the background check itself or the length of the waiting period, but only the requirement of subsequent purchasers to comply with the full waiting period if the background check is completed in less than ten days. As noted, requiring some length of time between purchase and possession of a firearm is a proposition of longstanding acceptance.

II. THE WAITING PERIOD LAWS PASS HEIGHTENED SCRUTINY

Should the Court proceed to the second, "scrutiny" step of the analysis, the Court should find that a short waiting period imposes at most a de minimis burden on firearm purchasers, including subsequent purchasers, by slightly delaying their possession of a new firearm, and does not place a severe burden on their Second Amendment rights. AOB 41-45. The level of scrutiny to be applied is at most intermediate scrutiny.[8] AOB 39-45. Although the District Court nominally adopted intermediate scrutiny as the standard in this case, the court misapplied the "reasonable fit" prong of the two-part test.

A. There Is a Reasonable Fit Between the Waiting Period Laws and the State's Important Public Safety Interests

At the "scrutiny" step, the issue before this Court is whether there is a "reasonable fit" between a waiting period and California's undisputed important interests in public safety, preventing gun violence, and preventing prohibited individuals from obtaining firearms. 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. *Jackson*, 746 F.3d at 965. As to the first requirement, the District Court found, and Appellees do not dispute, that California has important interests in public safety,

[8] The District Court applied intermediate scrutiny, and Appellees do not argue for a different level of heightened review. ARB 36.

preventing gun violence, and preventing prohibited individuals from obtaining firearms. ER 44:24-45:5; ARB 36-37. This Court has also found that it is "self-evident" that government's interests in promoting public safety and reducing violent crimes are substantial and important. *Fyock*, 779 F.3d at 1000.

The fit between a waiting period and these objectives is reasonable. To show that the Waiting Period Laws are a "reasonable fit" with California's important objectives, Appellant need only show that the Waiting Period Laws promote "a 'substantial government interest that would be achieved less effectively absent the regulation,'" not that its regulations are the "least restrictive means" of achieving the State's interest. *Fyock*, 779 F.3d at 1000 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)); *see also U.S. v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir. 2010) (fit need only "be reasonable, not perfect"). Another Ninth Circuit formulation of the intermediate scrutiny standard is that the regulation must be "substantially related" to the government's interest. *Chovan*, 735 F.3d at 1141 (finding that prohibition of possession of firearm by a person convicted of domestic violence misdemeanor passes constitutional muster under intermediate scrutiny because it is "supported by an important government interest and substantially related to that interest"); *Jackson*, 746 F.3d at 966 (upholding requirement that persons store handguns in a locked storage container or with a trigger lock when not carried on the person because it is "substantially related to the important government interest of reducing firearm-related deaths and injuries").

In making these determinations, courts "must accord substantial deference to the predictive judgments" of legislative bodies, *Turner Broadcast Systems, Inc. v. FCC*, 520 U.S. 180, 195 (1997), and the State must be given "a reasonable opportunity to experiment with solutions to admittedly serious problems." *Jackson*, 746 F.3d at 966 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

This Court should apply the articulation of "reasonable fit" enunciated in *Fyock*, *Jackson*, and *Chovan*, the decisions issued by this Court since *Heller* that apply intermediate scrutiny to firearms regulation. Appellees appear to favor the formulation used in the First Amendment context, that the regulation be "narrowly tailored to achieve the desired objective." ARB 38. But Appellees' preference for a different formulation, and this Court's reference to the First Amendment case law as one point of reference in establishing its Second Amendment standard, cannot substitute for the actual Second Amendment standard this Court has established.

And even in the First Amendment context, this Court has explained that the "narrowly tailored" requirement "is satisfied" so long as the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . and the means chosen are not substantially broader than necessary to achieve the government's interest." *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007) (citation and internal punctuation marks omitted). Thus, even if the Court were to employ the First Amendment intermediate scrutiny terminology here, rather than continue to use the "reasonable

fit" label as in *Fyock*, *Jackson*, and *Chovan*, the substance of the standard would remain the same.

As Appellant established at trial and in its opening brief, the Waiting Period Laws pass intermediate scrutiny because California's important interests in public safety and preventing gun violence, and preventing prohibited individuals from obtaining firearms, would be achieved less effectively absent the Waiting Period Laws and are substantially related to those interests. AOB 45-60.

Appellees also incorrectly suggest that Appellant seeks to have this Court analyze the Waiting Period Laws under rational basis review rather than intermediate scrutiny. ARB 40-41. Pointing to Appellant's citations to *Fyock* and *City of Los Angeles v. Alameda Books, Inc.*, Appellees suggest that Appellant seeks to develop a rationale for the waiting period after the fact. ARB 41-42. Appellees are wrong. The rationales for the Waiting Period Laws were well established long before this litigation commenced. *See* AOB 6-14. Appellant cites to *Fyock* and *City of Los Angeles* for the proposition that Appellant is entitled to rely on any evidence "reasonably believed to be relevant" to substantiate its important interests. *Fyock*, 779 F.3d at 1000; *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). The evidence that Appellant submitted through legislative history materials, history books, social science studies, government reports, and witness testimonies are relevant and fully substantiate the State's important interests.

The evidence here shows that the Waiting Period Laws promote the State's interests in public safety, preventing gun violence, and preventing prohibited individuals from obtaining firearms. AOB 12-14, 46-49. The Waiting Period Laws do this by providing a cooling-off period, by providing time to complete the background check, by providing time for BOF agents to conduct straw purchase investigations, and by allowing BOF to consider late-arriving information in determining eligibility. *Id.* Absent the Waiting Period Laws, the State's interests would be achieved less effectively, if at all.

B. The Original Purpose of the Waiting Period Was to Provide a Cooling-Off Period

The original intent behind the California waiting period was "to provide at least an overnight cooling-off period from 'application for the purchase,'" which was later "supplemented with additional time to allow the Department of Justice to investigate the prospective purchaser of the weapon." *People v. Bickston*, 91 Cal. App. 3d Supp. 29, 32 (Cal. App. Super. Ct. 1979). Appellees suggest that the Court should focus on a law's actual purpose, rather than any hypothetical purpose. ARB at 40-41. But that is precisely what Appellant has set forth. The best evidence available indicates the Legislature imposed a waiting period to "provide at least an overnight cooling off period" from application for the purchase of a firearm, which was later supplemented over the years with allowing sufficient time for the BOF to investigate the prospective purchaser of the weapon. *Bickston*, 91

Cal. App. 3d Supp. at 33; AOB 6-8; EOR 250 (waiting period extended to five days because three days are not sufficient to conduct the background check).

Appellees further suggest that, to support the State's important interests, Appellant may only use evidence specifically considered by the Legislature in enacting the Waiting Period Laws. ARB 40-41. But this assertion is directly contrary to settled authority. As this Court recently stated, the government is entitled to rely on any evidence "reasonably believed to be relevant" to substantiate its important interests.[9] *Fyock*, 779 F.3d at 1000.

As shown by the record, and as discussed below, Appellant has submitted abundant evidence to substantiate the "reasonable fit" between the Waiting Period Laws and California's important interests here.

1. Substantial Evidence Supports the Conclusion That a Waiting Period Reduces Suicides and Other Violent Acts

Social science studies, as well as logic and common sense, dictate the conclusion that suicides and other violent acts by firearm would be reduced if individuals contemplating committing these acts lack immediate access to a working firearm. The impulsive nature of gun-related suicides is well documented.

[9] In *Fyock*, there is no suggestion that the evidence reviewed and considered by this Court and the district court was limited to what may have been before the voters in Sunnyvale when those voters passed Measure C. *Fyock*, 779 F.3d at 1000. Rather, the evidence relied on by the district court included "pages of credible evidence" submitted by the litigant, "from study data to expert testimony to the opinions of Sunnyvale public officials." *Id.*

See, generally, AOB 13-14. "Many suicides appear to be the result of impulsive behavior," and individuals who commit suicide often do so when confronting a severe but temporary crisis. EOR 263 (citing Richard H. Seiden, *Suicide Prevention: A Public Health/Public Policy Approach*, 8 Omega 267, 267-75 (1977)). Studies show that restrictions preventing immediate access to a gun, such as a waiting period, allow time for a cooling-off period during which suicidal impulses may pass. *See, e.g.*, EOR 253.

Studies also show a positive correlation between a waiting period on firearm acquisition and a reduction in suicides.[10] As a result, some in the medical community have recommended a waiting period for handgun purchases. *See, e.g.*, EOR 253 (E. Michael Lewiecki & Sara A. Miller, *Suicide, Guns, and Public Policy*, 103 Am. J. Pub. Health 27, 29 (2013) ("In accordance with the medical evidence, we recommend a waiting period for purchasing handguns with a requirement for a permit or license that includes firearm safety training.")).

[10] *See, e.g.*, EOR 265 ("Firearm license to purchase or waiting period to purchase laws were found to reduce the rate of white male suicides aged 20 to 64 by 3 suicides per 100,000 population") (citing M. H. Medoff & J. P. Magaddino, *Suicides and Firearm Control Laws*, 7 Evaluation Review 357-72 (1983)); EOR 253 ("In the United States, overall suicide rates are lower in states with restrictive firearm laws (e.g., waiting periods, safe storage requirements, minimum age of 21 years for handgun purchase) than in those with few restrictions") (citing K.R. Conner & Y. Zhong, *State Firearm Laws and Rates of Suicide in Men and Women*, 25 Am. J. Prev. Med. 320-324 (2003)).

Amicus Curiae Crime Prevention Research Center asserts that while gun control policies may reduce the number of gun suicides, they do not reduce the overall risk of suicide. Brief of Amicus Curiae Crime Prevention Research Center in Support of Appellees (Dkt. 47) at pp. 9-10. This argument fails for two reasons. First, firearms are used in 60-70% of suicides in the United States.[11] The State has an unqualified interest in promoting public safety and preserving human life by reducing violence by firearm, including firearm violence committed on oneself. Second, the Crime Prevention Research Center's assertion is also contrary to more recent studies. For example, a 2010 study examined the Israeli Defense Force's restriction of its soldiers taking their firearms home with them over the weekend. Lubin at p. 422. The result of the restriction was a 40% decline in the number of suicides, which is in line with previous studies that found restricting access to firearms is effective in decreasing both suicides rates due to firearms and overall suicide rates. *Id.* (citing J. Ozanne-Smith, J., et al., *Firearm Related Deaths: The Impact of Regulatory Reform*, 10 Injury Prevention 280-86 (2004), and D. W. Webster, et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 Journal of the American Medical Association, 594–601 (2004)).

[11] G. Lubin, et al., *Decrease in Suicide Rates After a Change in Policy Reducing Access to Firearms in Adolescents: A Naturalistic Epidemiological Study*, 40 Suicide and Life-Threatening Behavior 421 (2010) (Lubin) *available at* http://gsoa.feinheit.ch/media/medialibrary/2010/12/Lubin_10.pdf.

In any event, even accepting that there may be conflicting empirical evidence as to the relationship between waiting periods and public safety, that would not amount to an "unreasonable fit" between the State's approach and public safety. *See Drake v. Filko*, 724 F.3d 426, 439 (3rd Cir. 2013) (upholding New Jersey law regulating the issuance of permits to carry handguns in public, despite conflicting contentions as to whether interest of public safety is better served by having applicants demonstrate a "justifiable need" to publicly carry handgun for self-defense).

2. Subsequent Purchasers Who Do Not Currently Possess Working Firearms Stand in the Same Position as First-Time Gun Purchasers

Appellees do not challenge these studies on the effect of a cooling-off period, or their conclusions.[12] Rather, Appellees argue that the studies on the relationship between firearms and suicide that support a cooling-off period assume individuals do not already possess a firearm, and argue thus that Appellant does not distinguish between first-time and subsequent purchasers. ARB 51.

Appellees' argument fails because uncontroverted evidence shows that many people who at one time in the past were known to have firearms (i.e., those in the

[12] Amicus Curiae Crime Prevention Research Center do challenge the conclusions of these studies. But even the co-author of the brief, Mr. John R. Lott, admitted in his own cited publication that there is "some suggestive evidence indicating that waiting periods slightly reduce gun suicide rates for older people." John R. Lott, *Impact of the Brady Act on Homicide and Suicide Rates*, 284 J. Am. Med. Ass'n 2718 (2000).

AFS database) may well *not* possess a working firearm when an impulse to commit suicide or another violent act strikes. *See* AOB 47-48. Firearms are lost, stolen, and loaned out. EOR 108:15-24 (BOF Assistant Chief testifying that "a lot of the firearms involved in [the firearm application] process . . . have been reported lost or stolen"). Firearms at times are not in working condition, and at times lack the proper ammunition. EOR 95:19-96:10 (Appellee Silvester testifying that one or more of his guns were not available for him to use for months at a time because they were not in working condition or lacked the proper ammunition).

Rather than challenging these facts, Appellees attempt to dismiss them as "unremarkable." ARB 53. They are "unremarkable" in the usual course of events, perhaps, but what they show is it is very ordinary for subsequent purchasers not to have their firearms available for use for a variety of reasons, which Appellees appear to acknowledge. And subsequent purchasers in such circumstances are in the same position as first-time gun purchasers, such that a cooling-off period would be effective for them just as it would be for a first-time gun purchaser.

Appellees and the District Court suggest that the State could simply have the purchaser confirm on the purchase application that he or she still possesses a previously-purchased firearm. ARB 54; EOR 48 n.36. This suggestion, however, ignores practical realities the State cannot afford to ignore—anyone angry or despondent enough to purchase a firearm to commit an impulsive act of violence

will not be concerned about the ramifications of furnishing false information on the firearm application.

Appellees also suggest that to address the possibility that a subsequent purchaser may not be in possession of his or her firearm, the State could simply require them to demonstrate to a firearm dealer that they still possess the firearm listed in the AFS system. ARB 54. But of course this would be unworkable. Under Appellees' "solution," prior to taking possession of the new firearm the subsequent purchaser would have to bring his or her old firearm to the dealer at the time of purchase, the dealer would have to match the old firearm against the record in the AFS database,[13] and the subsequent purchaser would then demonstrate that the firearm is in working condition and has proper ammunition, by firing the weapon or otherwise. On its face, Appellees' suggestion appears to impose arguably a greater burden on subsequent purchasers (and dealers) than a short waiting period.

Appellees further argue that the District Court did not clearly err when it found that a person whose name is associated with a firearm transaction "must be assumed" to actually possess the firearm. ARB 54. The District Court's finding, however, is unsupported by evidence. Uncontroverted testimony at trial shows that

[13] Dealers do not have access to the AFS database. So this "solution" would either require the dealers to obtain access to the AFS or require BOF to provide the relevant AFS records of subsequent purchasers to the dealers, introducing additional legal and technical complications and burdens.

the AFS database is merely a "leads" database. SER 07:11-21. When a law enforcement officer in the field accesses the AFS database, the database does not inform the officer whether a person currently possesses a firearm, but merely alerts the officer that a person may potentially possess a firearm so the officer could take any necessary precaution.[14] *Id.* This is supported by the report that Appellees cite for their assertion that law enforcement officers rely on AFS in performing their work, which provides that the AFS database merely allows officers to search "*historical* DROS records of gun ownership." SER 31 (emphasis added). As uncontroverted trial evidence further shows, persons listed in the AFS database as possessing certain firearms often do not actually possess those firearms. AOB 56 (citing EOR 155:20-156:8 (testimony of BOF special agent Blake Graham)).

3. The District Court Erred in Its Findings Regarding Persons with CCWs

The District Court's failure to recognize the "reasonable fit" was based in part on its unsubstantiated finding that CCW permit holders are "unlikely" to engage in "acts of impulsive violence." EOR 51. This finding is not supported by any evidence in the record, but rather was simply a product of the District Court's own

[14] Also contrary to Appellees' assertion, Appellant did not suggest that the AFS database "can't be trusted." ARB 54. Rather, Appellant stated that the AFS database is not intended to be used in the manner the District Court and Appellees intend for it to be used, i.e., to determine whether a person currently possesses a working firearm. AOB 55. As discussed above, the AFS database is intended to be used by law enforcement only as a "leads" database.

conclusory reasoning: to obtain a CCW permit, an applicant must show that he or she "is of good moral character" and that "[e]ngaging in unlawful acts of violence is inconsistent with good moral character." ER 51. But the statutory syllogism does not work, of course, because good moral character is no talisman against violent impulses. There simply was no meaningful evidence as to the character traits of CCW permit holders, as compared to the general population, and the District Court's reasoning further failed to account for suicides. *See* AOB 57-59.

Indeed, Appellees do not defend the flaws in the District Court's reasoning, which Appellant identified in her opening brief, but instead repeat the flawed reasoning with more of the same conclusory reasoning. In addition to a CCW permit holder's "good moral character," they point to the instructions on firearm safety and law that CCW applicants receive in order to receive and keep a permit. ARB 57. But the additional instructions on firearm safety and law that CCW permit holders receive do not mean that those persons will be less susceptible to impulses, much less impulses relating to committing violence upon others or themselves.

As Appellant demonstrates above, a cooling-off period reduces suicides and other violent acts and the cooling-off period rationale for the Waiting Period Laws applies to subsequent purchasers just as it does to first time purchasers. A subsequent purchaser's firearm may not be available for use when an impulse to commit violence upon oneself or others arises. For these reasons, the Waiting

Period Laws are a "reasonable fit" with the State's important objectives in public safety and preventing gun violence.

C. A Waiting Period Provides Time for BOF to Conduct Straw Purchase Investigations

Another reason the State's important interests in public safety, preventing gun violence, and preventing prohibited individuals from obtaining firearms would be achieved less effectively without the waiting period, and the waiting period is "substantially related" to these interests, is that the waiting period provides time for BOF to conduct straw purchase investigations. Appellees do not address these points. *See* ARB 58-59. Rather, Appellees incorrectly assert that Appellant did not contest the Court's finding that straw purchase investigations do not establish a reasonable fit. *Id.* at 58. To the contrary, Appellant unambiguously argues that one rationale for the waiting period is that it affords time for straw-purchase investigations. AOB 12-13, 34, 58.

Uncontroverted evidence shows that without a 10-day waiting period, more straw purchases would be completed, thus compromising public safety. If firearms are released immediately after the background check is complete by auto-approval, it would be "nearly impossible" for BOF agents to complete straw purchase investigations and intercept firearms before they are released to the straw purchasers. EOR 137:1-12 (testimony of BOF special agent Blake Graham); *see also* EOR 140:24-141:9, 144:5-22 (same). Undisputed testimony at trial shows

that if firearms were released near instantaneously after submission of the firearm application (as they would in an auto-approval situation, under the District Court's injunction), it would require a retrieval operation "maybe 99% of the time."[15] EOR 138:17-139:2 (testimony of BOF special agent Blake Graham). Once a firearm is released to a straw purchaser, BOF agents would have to retrieve the firearm from either the straw purchaser or the end purchaser, thereby compromising the safety of the public. EOR 137:24-138:5 (same).

This reason alone is sufficient to demonstrate a "reasonable fit" between the state's important interest in public safety and the 10-day waiting period.

D. A Waiting Period Allows BOF to Consider Late-Arriving Information in Determining Eligibility

The evidence shows that the Waiting Period Laws promote the State's interests in public safety, preventing gun violence, and preventing prohibited individuals from obtaining firearms by allowing BOF to consider late-arriving information in determining eligibility. The District Court had rejected the State's argument that late-arriving information must be considered, concluding that there is no evidence that a "material" number of auto-approved firearm applications are

[15] The District Court's Order provides that Appellant shall retain her ability to delay a transfer or sale of a firearm when further investigation is necessary. EOR 56. This remedy, however, is ineffective in preserving the ability of BOF agents to conduct straw purchase investigations. In the situation where a firearm application is auto-approved, which occurs 20% of the time, there would not be time for BOF agent to begin an investigation before the firearm is released, much less time to delay the transfer.

rechecked. ARB 44-45 (citing ER 30:6-10 & 46 n.34). But that finding only considers the 20 percent of applications that are auto-approved, and fails to account for the impact of late-arriving information on the 80 percent of applications that are not auto-approved. Additionally, Appellant need only show that absent the regulation, the State's interest would be achieved less effectively. *See Fyock*, 779 F.3d at 1000. Appellant made that showing here.

The need to preserve a waiting period to allow receipt of late information is amply demonstrated in the record. For example, BOF's Assistant Chief testified that BOF reviews auto-approved firearm applications within the waiting period for numerous reasons. SER 03:7-04:1 (testimony of Assistant Chief Steve Buford). BOF is sometimes contacted by medical professionals or peace officers who inform BOF, for example, that a certain applicant became prohibited after submitting his or her firearm application. *Id.* (same). If a firearm is released to that applicant immediately after auto-approval, BOF agents would have to retrieve

the firearm from that individual, compromising the safety of the public.[16] EOR 137:13-138:5 (testimony of BOF special agent Blake Graham). Thus, if BOF is deprived of an opportunity to consider information it receives after an auto-approval, the State's interest in public safety, preventing gun violence, and preventing prohibited individuals from obtaining firearms would be achieved less effectively.

III. THE DISTRICT COURT DID NOT AFFORD APPELLANT SUFFICIENT TIME TO COMPLY WITH THE JUDGMENT

The District Court initially provided Appellant six months to comply with the injunction. EOR 55. The District Court denied Appellant's motions to stay and to alter the judgment primarily based on its erroneous belief that Appellant already possesses the financial and human resources to make the necessary alterations to its background check system and to implement the injunction within that time

[16] Appellees and the District Court mistakenly rely on the Armed and Prohibited Persons System (APPS) database and the "rap back system" as "safety nets" to address instances where BOF receives disqualification information after an auto-approval. ARB 47-49; EOR 46:27-47:2 (APPS database), 50:18-19 (rap back system). The existence of these systems, however, does not mean the "fit" of the existing statutory scheme with the public safety goals is not "reasonable." The purpose of these other systems is remedial, to identify prohibited persons who possess firearms. EOR 34:26-35:16 (description of APPS database), 35:18-28 (description of the rap back system). They require law enforcement officers to retrieve those firearms from prohibited, and potentially dangerous, persons. EOR 35:5-7. The retrieval operations compromise public safety. EOR 137:13-138:5 (testimony of BOF special agent Blake Graham). It is far safer for law enforcement officers to prevent release of a firearm to a prohibited person than to retrieve it from a prohibited person. *Id.*

frame. EOR 61, 65. Based on the evidence, the District Court's denials of Appellant's motions to stay and to alter the judgment were an abuse of discretion.[17]

Uncontroverted evidence shows that, to comply with the judgment, BOF needs to (1) obtain additional budgetary appropriations from the California Legislature, which is not subject to Appellant's control, and (2) hire and train a significant number of new employees to do extra processing of DROS applications, and (3) either (a) reassign in-house IT experts working on other critical projects or (b) hire and train an outside vendor to modify the relevant computer systems. EOR 82-83. Uncontroverted evidence further shows that the steps that must be taken to implement the injunction require more than six months to complete. EOR 86-87, ¶¶ 8, 18 (Declaration of Marc St. Pierre, Information Technology manager of BOF systems and databases).

Appellees do not dispute this evidence but propose suggestions to streamline the background check process. ARB 60. These suggestions, not based on any knowledge of the technical systems involved, do not controvert the evidence Appellant submitted regarding the time and effort required to implement the injunction.

[17] In its denial of Appellant's Motions to Stay and to Alter the Judgment, the District Court stated that it would consider requests for additional time to comply with the judgment. EOR 66:9-16. This conditional assurance, however, does not permit Appellant to properly plan and prepare to make the changes necessary to comply with the judgment.

Appellees further argue that financial constraints do not allow the State to deprive persons of their constitutional rights. ARB 59-60. Appellant, however, does not seek to avoid the District Court's judgment based on financial constraints. Rather, should this Court affirm the District Court's judgment, Appellant simply seeks additional time to do the work that would be necessary to comply with the judgment, and sufficient time for the Legislature to appropriate funding for Appellant to do so.

CONCLUSION

For the reasons provided in Appellant's Opening Brief and herein, the District Court judgment should be reversed.

Dated: June 30, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

/S/ PETER H. CHANG

PETER H. CHANG
Deputy Attorney General
Attorneys for Defendant-Appellant Kamala Harris, Attorney General of California

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,771 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: June 30, 2015

/S/ PETER H. CHANG

PETER H. CHANG
Deputy Attorney General
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 30, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

BY: /S/ PETER H. CHANG
PETER H. CHANG
Deputy Attorney General
Counsel for Defendant-Appellant