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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

**JEFF SILVESTER, MICHAEL POESCHL,
BRANDON COMBS, THE CALGUNS
FOUNDATION, INC., a non-profit
organization, and THE SECOND
AMENDMENT FOUNDATION, INC., a
non-profit organization,**

Plaintiffs,

v.

**KAMALA HARRIS, Attorney General of
California (in her official capacity), and
DOES 1 to 20,**

Defendants.

1:11-cv-02137-AWI-SKO

**NOTICE OF MOTION AND MOTION
OF DEFENDANT CALIFORNIA
ATTORNEY GENERAL KAMALA D.
HARRIS FOR SUMMARY JUDGMENT
(FED. R. CIV. P. 56)**

Hearing Date: October 28, 2013
Hearing Time: 1:30 p.m.
Trial Date: March 25, 2014
Action Filed: December 23, 2011

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take NOTICE that, at 1:30 p.m. on October 28, 2013, or as soon thereafter as the matter may be heard, in Courtroom 2 (Senior U.S. District Judge Anthony W. Ishii, presiding) on the Eighth Floor of the above-entitled Court, located at the Robert E. Coyle Federal Courthouse, 2500 Tulare St., Fresno, CA 93721, Defendant Kamala D. Harris, Attorney General of the State

1 of California (the “Attorney General”), will and hereby does move, under Federal Rule of Civil
2 Procedure 56, for summary judgment of this entire case adverse to Plaintiffs Jeffrey A. Silvester,
3 Brandon S. Combs, The Calguns Foundation, Inc., and The Second Amendment Foundation, Inc.
4 (Collectively, “Plaintiffs.”)

5 The grounds for the Attorney General’s motion for summary judgment are two-fold.
6 First, the enforcement of the California statutes that mandate a 10-day waiting period between
7 application to purchase and delivery of firearms for all California residents not statutorily
8 exempted, which law enforcement Plaintiffs attack, does not substantially burden people’s
9 Second Amendment right and does not infringe the Second Amendment. Second, there is no
10 violation of the Fourteenth Amendment’s Equal Protection Clause because certain groups of
11 people have statutory exemptions from the 10-day waiting period; the exemptions do not
12 discriminate against any suspect class of people or unduly burden the exercise of a fundamental
13 right, and the exemptions are rationally related to legitimate government objectives.

14 The Attorney General’s motion for summary judgment is based on the present notice of
15 motion and motion; the accompanying memorandum of points and authorities; and the
16 accompanying declaration of Jonathan M. Eisenberg.

17 Dated: September 25, 2013

Respectfully submitted,

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19 Attorney General of California
20 MARK R. BECKINGTON
Supervising Deputy Attorney General

21
22 /s/
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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT CALIFORNIA
ATTORNEY GENERAL KAMALA D.
HARRIS'S MOTION FOR SUMMARY
JUDGMENT (FED. R. CIV. P. 56) –
INCLUDING STATEMENT OF
UNDISPUTED MATERIAL FACTS**

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Fed. R. Civ. P. 56 5

Defendant Kamala D. Harris, Attorney General of the State of California (the “Attorney General”), submits the following memorandum of points and authorities in support of her motion for summary judgment against Plaintiffs Jeffrey A. Silvester (“Silvester”), Brandon S. Combs (“Combs”; together with Silvester, the “Individual-Person Plaintiffs”), The Calguns Foundation, Inc. (“CGF”), and The Second Amendment Foundation, Inc. (“SAF”).

SUMMARY OF CASE

Plaintiffs mount a federal constitutional challenge to two California laws, California Penal Code sections 26815 and 27540 (together, the “Waiting Period Law” or the “Law”), that mandate a 10-day waiting period between application to purchase and delivery of a firearm, for all California residents not statutorily exempt from the waiting period.¹

The Waiting Period Law has long been justified on two solid grounds. First, the Law creates a “cooling off” period to limit a person’s immediate access to firearms, in case the person has an impulse to use a firearm to commit an act of violence. Second, the Law allows law-enforcement officials sufficient time to conduct thorough background checks on prospective firearms purchasers, so that people prohibited by law from possessing firearms (because of, e.g., having violent felony convictions) are hindered in acquiring them. *See People v. Bickston*, 91 Cal. App. 3d Supp. 29, 31 (1979) (interpreting relevant legislative history).

In attacking the Waiting Period Law, Plaintiffs make two primary but insufficient contentions. First, Plaintiffs argue that the 10-day waiting period infringes, without sufficient justification, on their Second Amendment right under the U.S. Constitution. Plaintiffs contend that a waiting period is especially unjustified for anybody who has been through the waiting period before in connection with a prior firearm purchase, and who must go through the waiting period again to acquire additional firearms. Second, Plaintiffs assert that their right to equal protection under the Fourteenth Amendment is violated by statutory exemptions for certain classes of people from the Waiting Period Law, exemptions that the Individual-Person Plaintiffs and similarly situated people do not enjoy.

¹ The differences between the two statutes appear to be irrelevant to the present case, and so the two statutes are treated as one statute here.

Contrary to Plaintiffs' assertions, the brief delay occasioned by the Waiting Period Law does not infringe on any Second Amendment interest that has been recognized by the courts. At most, the Law presents only a minor inconvenience in the process leading to the acquisition of firearms, not an infringement on an individual person's right to keep and bear arms. Nor is the Fourteenth Amendment infringed by the limited exemptions granted by the Legislature. The waiting period and the exemptions are fully justified under any appropriate level of scrutiny.

No material, undisputed facts are present. Instead, this case presents pure questions of federal constitutional law ripe for resolution via motion for summary judgment. As discussed below, the Court should enter summary judgment in favor of the Attorney General for the entire case.

QUESTIONS PRESENTED

1.A. Does enforcement of California's statutory 10-day waiting period between an individual person's application to purchase a firearm and delivery of the firearm to the person (Cal. Penal Code §§ 26815 and 27540) violate the Second Amendment?

1.B. Does enforcement of California's statutory 10-day waiting period between an individual person's application to purchase a firearm and delivery of the firearm to the person (Cal. Penal Code §§ 26815 and 27540) violate the Second Amendment, where the person already has gone through at least one 10-day waiting period in connection with at least one previous firearm purchase?

2. Does the allowance of multiple statutory exemptions to the 10-day waiting period, and concomitant creation of some groups of people with exemptions alongside other groups of people lacking any exemptions, violate the Fourteenth Amendment's Equal Protection Clause?

BRIEF ANSWERS

1.A. No. Enforcement of California's statutory 10-day waiting period does not substantially burden any person's Second Amendment right and does not abridge the Second Amendment under any appropriate standard of review.

1.B. No. Enforcement of California's statutory 10-day waiting period as to a person who has already gone through at least one 10-day waiting period in connection with a previous

1 firearm purchase does not substantially burden that person's Second Amendment right and does
2 not abridge the Second Amendment under any appropriate standard of review.

3 2. No. There is no violation of the Fourteenth Amendment's Equal Protection Clause
4 merely because certain groups of people have statutory exemptions from the 10-day waiting
5 period; the exemptions do not discriminate against any suspect class of people or unduly burden
6 the exercise of a fundamental right, and the exemptions are rationally related to legitimate
7 government objectives.

8 BACKGROUND INFORMATION

9 The Waiting Period Law, in various iterations imposing a waiting period of between one
10 day and 15 days for purchases of firearms (sometimes for handguns only), has been in effect in
11 California for 90 years. *Deering's California Codes, Penal Code Annotated of the State of*
12 *California*, §§ 1473 to End at 735 (1961), citing Stats. 1923 ch. 339, § 10, p. 710; First Am.
13 Compl., ¶¶ 45-47. For about two decades in the 1970s through the 1990s, the waiting period for
14 handguns was 15 days. See *People v. Doolin*, 45 Cal. 4th 390, 415 (2009); *Jacoves v. United*
15 *Merchandising Corp.*, 9 Cal. App. 4th 88, 112 nn.13, 14 (1992); *Bickston*, 91 Cal. App. 3d Supp.
16 at 31 (1979); First Am. Compl., ¶¶ 45-47.

17 Presently, California Penal Code section 26815(a) provides as follows:

18 No firearm shall be delivered...[w]ithin 10 days of the application to purchase, or,
19 after notice by the [California Department of Justice ("DOJ")] pursuant to section
20 28220, within 10 days of the submission to the department of any correction to the
application, or within 10 days of the submission to the department of any fee
required pursuant to section 28225, whichever is later.

21 California Penal Code section 27540(a) provides as follows:

22 No [firearms] dealer...shall deliver a firearm to a person...[w]ithin 10 days of the
23 application to purchase, or, after notice by the department pursuant to section
24 28220, within 10 days of the submission to the department of any correction to the
application, or within 10 days of the submission to the department of any fee
required pursuant to section 28225, whichever is later.

25 The 10-day waiting period is part of an approval process designed to restrict firearms
26 purchases to those persons legally eligible to possess and to own firearms. As explained in DOJ
27 publication *California Firearms Summary 2013* (available online at <http://oag.ca.gov/firearms>):
28

1 In California, only licensed California firearms dealers who possess a valid
 2 Certificate of Eligibility (COE) are authorized to engage in retail sales of firearms.
 3 These retail sales require the purchaser to provide personal identifier information
 4 for the Dealer Record of Sale (DROS) document that the firearms dealer must
 5 submit to the DOJ. There is a mandatory 10-day waiting period before the
 6 firearms dealer can deliver the firearm to the purchaser. During this 10-day
 7 waiting period, the DOJ conducts a firearms eligibility background check to ensure
 8 the purchaser is not prohibited from lawfully possessing firearms.

9 . . . Generally, it is illegal for any person who is not a California licensed firearms
 10 dealer (private party) to sell or transfer a firearm to another non-licensed person
 11 (private party) unless the sale is completed through a licensed California firearms
 12 dealer. A "Private Party Transfer" (PPT) can be conducted at any licensed
 13 California firearms dealership that sells handguns. The buyer and seller must
 14 complete the required DROS document in person at the licensed firearms
 15 dealership and deliver the firearm to the dealer who will retain possession of the
 16 firearm during the mandatory 10-day waiting period. In addition to the applicable
 17 state fees, the firearms dealer may charge a fee not to exceed \$10 per firearm for
 18 conducting the PPT.

19 The infrequent transfer of firearms between immediate family members is exempt
 20 from the law requiring PPTs to be conducted through a licensed firearms dealer.
 21 For purposes of this exemption, "immediate family member" means parent and
 22 child, and grandparent and grandchild, but does not include brothers or sisters
 23 (Pen. Code, § 16720).

24 (*Id.* at 3.)

25 According to the California Bureau of Firearms publication *Dealer Record of Sales*
 26 *Transactions* (available online at <http://oag.ca.gov/firearms/statistics>), DOJ processed 2,827,042
 27 DROS applications in the five-year period between January 1, 2008, and December 31, 2012.
 28 (*Id.* at 2.) DOJ denied 28,430 of the applications. (*Id.*)

19 STATEMENT OF UNDISPUTED MATERIAL FACTS

20 As stated above, this case presents pure questions of federal constitutional law. The case
 21 involves very few material facts, and none of them are in dispute. The undisputed material facts
 22 are:

23 1. At all relevant times, one effect of the Waiting Period Law has been that all California
 24 residents lawfully purchasing firearms must wait a minimum of 10 days between applying to
 25 purchase the firearms and receiving delivery of them (unless the purchasers are statutorily exempt
 26 from the waiting period). (First Am. Compl., ¶¶ 1, 20, 21.)

27 2. At all relevant times, Silvester has owned at least one firearm. (First Am. Compl., ¶¶
 28 1, 2.; Decl. of Jonathan M. Eisenberg in Supp. of Def. Cal. Att'y Gen. Harris's Mtn. for Summ. J.

1 (“Eisenberg Decl.”), Exh. A (Silvester Interrog. Resps.) at 3:5-3:6.)

2 3. At all relevant times, Combs has owned at least one firearm. (First Am. Compl., ¶¶ 1,
3 3; Eisenberg Decl., Exh. B (Combs Interrog. Resps.) at 3:5-3:6.)

4 **PROCEDURAL HISTORY**

5 On December 23, 2011, Plaintiffs plus another individual person, Michael Poeschl
6 (“Poeschl”), a former plaintiff who later voluntarily withdrew from the case, filed the original
7 complaint in this case. No defendant ever filed a pleading responsive to that complaint. On
8 February 24, 2012, Plaintiffs plus Poeschl voluntarily filed the first amended complaint, which
9 remains the operative complaint, and contains two causes of action asserted under the U.S.
10 Constitution, one under the Second Amendment and the other under the Fourteenth Amendment.
11 On March 15, 2013, the Attorney General answered the first amended complaint.

12 While discovery has taken place in the case (and the discovery period is closed), there
13 have been no contested motions previously in the case. The present motion for summary
14 judgment is the first contested motion in the case.

15 **LEGAL STANDARDS FOR MOTIONS FOR SUMMARY JUDGMENT**

16 Summary judgment is appropriate when it is demonstrated that there exists no genuine
17 issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
18 Fed. R. Civ. P. 56; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d
19 142 (1970); *Fortune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. 2004). The
20 party seeking summary judgment bears the initial burden of informing the court of the basis for
21 its motion and of identifying the portions of the declarations (if any), pleadings, and discovery
22 that demonstrate an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
23 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Soremekun v. Thrifty Payless, Inc.*, 509
24 F.3d 978, 984 (9th Cir. 2007). A fact is “material” if it might affect the outcome of the suit under
25 the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505,
26 91 L.Ed.2d 202 (1986); *United States v. Kapp*, 564 F.3d 1103, 1114 (9th Cir. 2009). A dispute is
27 “genuine” as to a material fact if there is sufficient evidence for a reasonable jury to return a
28

1 verdict for the non-moving party. *Anderson*, 477 U.S. at 248; *Freecycle Sunnyvale v. Freecycle*
 2 *Network*, 626 F.3d 509, 514 (9th Cir. 2010).

3 Where the non-moving party will have the burden of proof on an issue at trial, the movant
 4 may prevail by presenting evidence that negates an essential element of the non-moving party's
 5 claim or by merely pointing out that there is an absence of evidence to support an essential
 6 element of the non-moving party's claim. *See James River Ins. Co. v. Herbert Schenk, P.C.*, 523
 7 F.3d at 915, 923 (9th Cir. 2008); *Soremekun*, 509 F.3d at 984. If a moving party fails to carry its
 8 burden of production, then "the non-moving party has no obligation to produce anything, even if
 9 the non-moving party would have the ultimate burden of persuasion." *Nissan Fire & Marine Ins.*
 10 *Co. v. Fritz Cos.*, 210 F.3d 1099, 1105-06 (9th Cir. 2000). If the moving party meets its initial
 11 burden, the burden then shifts to the opposing party to establish that a genuine issue as to any
 12 material fact actually exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
 13 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Nissan Fire*, 210 F.3d at 1103. The opposing
 14 party cannot "rest upon the mere allegations or denials of the pleading but must instead produce
 15 evidence that sets forth specific facts showing that there is a genuine issue for trial." *Estate of*
 16 *Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (internal punctuation omitted).

17 The opposing party's evidence is to be believed, and all justifiable inferences that may be
 18 drawn from the facts placed before the court must be drawn in favor of the opposing party. *See*
 19 *Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587; *Narayan v. EGL, Inc.*, 616 F.3d 895, 899
 20 (9th Cir. 2010). While a "justifiable inference" need not be the most likely or the most persuasive
 21 inference, a justifiable inference must be rational or reasonable. *See Narayan*, 616 F.3d at 899.
 22 Inferences are not drawn out of the air, and it is the opposing party's obligation to produce a
 23 factual predicate from which the inference may be drawn. *See Sanders v. City of Fresno*, 551 F.
 24 Supp. 2d 1149, 1163 (E.D. Cal. 2008); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993,
 25 997 (E.D. Cal. 2004). "A genuine issue of material fact does not spring into being simply
 26 because a litigant claims that one exists or promises to produce admissible evidence at trial." *Del*
 27 *Carmen Guadalupe v. Agosto*, 299 F.3d 15, 23 (1st Cir. 2002); *see Bryant v. Adventist Health*
 28 *System/West*, 289 F.3d 1162, 1167 (9th Cir. 2002). Further, a "motion for summary judgment

1 may not be defeated . . . by evidence that is merely colorable or is not significantly probative.”
 2 *Anderson*, 477 U.S. at 249–50; *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2006)
 3 (internal punctuation omitted). If the nonmoving party fails to produce evidence sufficient to
 4 create a genuine issue of material fact, the moving party is entitled to summary judgment. *Nissan*
 5 *Fire*, 210 F.3d at 1103.

6 ARGUMENT

7 I. THE ATTORNEY GENERAL IS ENTITLED TO SUMMARY JUDGMENT 8 ON PLAINTIFFS’ SECOND-AMENDMENT CLAIM

9 The Second Amendment states: “A well regulated Militia, being necessary to the security
 10 of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Assuming
 11 for the sake of argument that this Court accepts that the Waiting Period Law regulates conduct
 12 arguably within the Second Amendment’s scope, then the Court must analyze the Law for
 13 compliance with the Second Amendment. However, the U.S. Supreme Court has not defined the
 14 standard of scrutiny that applies to laws regulating conduct arguably within the Second
 15 Amendment’s scope. *District of Columbia v. Heller*, 554 U.S. 570, 628, 634, 128 S.Ct. 2783,
 16 171 L.Ed.2d 637 (2008). Nor has the U.S. Court of Appeals for the Ninth Circuit. *Nordyke v.*
 17 *King*, 681 F.3d 1041, 1044 (9th Cir. 2012). The standard of scrutiny remains an open question in
 18 the present case.

19 It is, nonetheless, instructive that the U.S. Supreme Court has held that “not every law
 20 which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.”
 21 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873, 112 S.Ct. 2791, 120
 22 L.Ed.2d 674 (1992). In the same vein, the High Court in *Heller* makes it plain that “[l]ike most
 23 rights, the right secured by the Second Amendment is not unlimited.” 554 U.S. at 626. Although
 24 *Heller* did uphold the invalidation of a very strict law of the District of Columbia that generally
 25 prohibited the possession of handguns, *id.* at 576, 636, *Heller* took care to provide an expressly
 26 non-exhaustive list of “presumptively lawful regulatory measures,” *id.* at 627 n.26—“a variety of
 27 tools” that “the Constitution leaves. . . for combating” the problem of firearm violence in the
 28 United States. *Id.* at 636. The list includes prohibitions on the possession of “weapons not

typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns,” *id.* at 625, and “M-16 rifles and the like,” *id.* at 627, as well as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. Likewise, *Heller* indicated that gunpowder-storage laws “do not remotely burden the right of self-defense...” *Id.* at 632. “Nor...does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.” *Id.*

A. The Challenged Laws Pass The Substantial-Burden Test

1. The Substantial-Burden Test Stated

In deciding Plaintiffs’ Second Amendment claim, this Court should adopt and apply the “substantial burden” test articulated in *United States v. DeCastro*, 682 F.3d 160 (2d Cir. 2012), a test that adheres faithfully to the above-repeated indications within *Heller* of the appropriate test.

In *DeCastro*, the Second Circuit held that “heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment.” *Id.* at 164. The *DeCastro* Court observed that *Heller* did not “mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).” *DeCastro*, 682 F.3d at 166.

DeCastro emphasized that its approach is consistent with that of other circuit courts, which have endorsed applying varying degrees of scrutiny based not only on the degree of burden on the Second Amendment right but also on the extent to which the regulation impinges on the “core” of the right. *Id.*

As *DeCastro* explained in justifying the substantial-burden standard, a similar threshold showing is needed to trigger heightened scrutiny of laws alleged to infringe other fundamental constitutional rights. 682 F.3d at 167. For example, the right to marry is fundamental, but “reasonable regulations that do not significantly interfere with decisions to enter into the marital

relationship” are not subject to the “rigorous scrutiny” that is applied to laws that “interfere directly and substantially with the right to marry.” *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978). The right to vote is fundamental, but “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Casey*, 505 U.S. at 873-74 (“[N]ot every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote;” holding that fact that law which serves valid purpose has incidental effect of making it more difficult to exercise a right cannot be enough to invalidate law); *Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999) (“[I]nconvenience, even severe inconvenience, is not an undue burden”).

Other circuit courts have joined *DeCastro* in holding that courts must consider the severity of the burden on Second Amendment rights in deciding what level of scrutiny to apply. *See, e.g., Heller v. District of Columbia*, 670 F.3d 1244, 1261, 1252 (D.C. Cir. 2011) (“[W]e determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right”); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“[T]he rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right”); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (to determine standard of review, “we would take into account the nature of a person’s Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government’s justifications for the regulation”); *see also Young v. Hawaii*, 911 F. Supp. 2d 972, 988 (D. Haw. 2012) (summarizing law in this area). Under this framework, as another U.S. District Court in this federal circuit has recognized, “[a] firearm law or regulation imposes a substantial burden on Second Amendment rights if the law or regulation bans law-abiding people from owning firearms or leaves them without adequate alternatives for acquiring firearms for self-defense.” *Scocca v. Smith*, No. C–11–1318 EMC, 2012 WL 2375203 at *7 (N.D. Cal. Jun. 22, 2012).

1 On the other hand, in the *absence* of such a severe burden, relatively lenient *rational-basis*
 2 *review* should be applied. *DeCastro*, 682 F.3d at 166-67. Under rational-basis review, a
 3 legislative classification will be upheld if it is rationally related to a legitimate government
 4 interest. *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002).

5 In the present case, the Court should adopt and apply a substantial-burden test like the one
 6 used in *DeCastro*.

7 **2. The Substantial-Burden Test Applied**

8 Under a substantial-burden analysis, Plaintiffs have not alleged a valid Second
 9 Amendment claim, because the 10-day waiting period, the alleged infringement of the Second
 10 Amendment, simply does not rise to the level of a constitutional violation. Plaintiffs' Second
 11 Amendment right is not materially infringed by the minimal delay imposed by the Law, allowing
 12 the California Bureau of Firearms to conduct mandatory background checks.

13 Under and after *Heller*, the Waiting Period Law, as a regulation of the commercial sale of
 14 firearms,² remains ones of the "tools" available to the State of California to address the problem
 15 of firearm violence without violating the Second Amendment. 554 U.S at 636.

16 Moreover, Plaintiffs cannot and do not allege that enforcement of the Waiting Period Law
 17 has left Plaintiffs, or the individual people that they represent, in the case of the organizational
 18 plaintiffs (CGF and SAF), unable to acquire legal firearms. Indeed, Plaintiffs own and have
 19 access to firearms already. (First Am. Compl. at ¶¶ 1, 2, 4, 55, 56, 64; Eisenberg Decl., Exhs. A
 20 (Silvester Interrog. Resps.) at 3:5-3:6, B (Combs Interrog. Resps.) at 3:5-3:6.) Since this lawsuit
 21 was filed, Plaintiffs (unless they have become disqualified from purchasing firearms) have had
 22 many chances to lawfully acquire additional firearms. Plaintiffs also can borrow other people's
 23 firearms, as Silvester has done before. (Eisenberg Decl., Exh. C (Depo. of Silvester) at 128.) In
 24 this regard, it is significant that law-abiding people in California generally have ready access to
 25 firearms, as the 2.8 million DROS transactions with only 28,000 denials between 2008 and 2012
 26 evidence.

27 ² California Penal Code sections 26815 and 27540 regulate firearms dealers. California
 28 Penal Code section 26815 also covers interpersonal sales of firearms.

1 Unable to claim that the Waiting Period Law deprives them of gun ownership, Plaintiffs
2 instead assert that enforcement of the Law inconveniences them by, for example, making them
3 have to take two trips instead of one trip to a firearms dealer to acquire firearms lawfully,
4 complaining that these trips take time and money (usually in gas bills for automobile travel).
5 (Eisenberg Decl., Exh. D (Depo. of Combs) at 170-71.) Similarly, Plaintiffs complain that it is
6 more difficult to purchase heavily discounted and/or hard-to-find firearms from remote sellers,
7 because of the need to make two trips to the sellers. (Eisenberg Decl., Exh. C (Depo. of Silvester)
8 at 42-57.)

9 But the case law cited above undercuts these complaints as the basis for a constitutional
10 violation. A mere burden or an inconvenience on a right without more is not a constitutional
11 violation. *Karlin*, 188 F.3d at 481. Only a substantial burden amounting to an effective denial of
12 the right is a constitutional violation. *DeCastro*, 682 F.3d at 166. Therefore, it is not of
13 constitutional significance in and of itself that Plaintiffs are merely inconvenienced by the
14 Waiting Period Law in acquiring firearms, by having to take second trips to the firearms dealer's
15 store. Also, nothing in the Second Amendment entitles Plaintiffs to obtain relatively rare or
16 intensely coveted firearms at discount prices at remote locations, without any waiting period,
17 especially when other serviceable firearms are available for purchase.

18 Given that the Waiting Period Law imposes only, at worst, a minor burden or an
19 inconvenience on the Second Amendment right, as explained above about *DeCastro*, 682 F.3d at
20 166-67, the Court should apply rational-basis review to the Law.

21 The Waiting Period Law easily passes rational-basis review. The Law is rationally related
22 to the indisputably legitimate—indeed, substantial—government interest in public safety via the
23 reduction of firearm violence. *See United States v. Call*, 874 F. Supp. 2d 969, 976-77 (D. Nev.
24 2012) (citing several cases classifying government interest in public safety via reducing gun
25 violence as satisfying not just rational-basis standard but intermediate-scrutiny standard); *Peruta*
26 *v. County of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (“In this case, Defendant
27 has an important and substantial interest in public safety and in reducing the rate of gun use in
28

1 crime”); *cf. United States v. Salerno*, 481 U.S. 739, 750, 754, 107 S.Ct. 2095, 95 L.Ed.2d 697
 2 (1987) (holding that government’s interest in reducing crime by arrestees is compelling).

3 As stated above, the Law serves that interest in at least two ways. First, the Law creates a
 4 cooling-off period to limit a person’s immediate access to firearms, in case the person has an
 5 impulse to use a firearm to commit an act of violence. Even if a person (like Silvester or Combs)
 6 already has a firearm, limiting that person’s ability to acquire another firearm can only decrease
 7 the likelihood that the person will use a firearm in an act of violence. The Law also allows law-
 8 enforcement officials sufficient time to conduct background checks on prospective firearms
 9 purchasers, so that people prohibited by law from having firearms (because of, e.g., having
 10 violent felony convictions) will not be able to acquire them. See *Bickston*, 91 Cal. App. 3d Supp.
 11 at 31. At bottom, ten days is not innately too long a time to wait to acquire a firearm, especially
 12 in light of the important societal interests that the waiting period serves.

13 Trying to establish that the Law is irrational, Plaintiffs assert that any person who, in
 14 connection with a firearms purchase, has legitimately passed a background check need not go
 15 through another background check, which supposedly would be redundant with the prior
 16 background check. (First Am. Compl., ¶¶ 20, 56, 64.) This assertion is false. That person may
 17 have become ineligible to possess and/or to purchase firearms since passing the earlier
 18 background check (*see* Cal. Penal Code §§ 29800 et seq., 30000 et seq.); thus, there is the same
 19 need for a background check of this person as of any other person, in connection with a present
 20 application to purchase firearms.³ Similarly, Plaintiffs have asserted that any person with a
 21 “certificate of eligibility” (for dealing in firearms) issued per California Penal Code section 26710
 22 has an “ongoing” background check, making redundant any background check associated with a
 23 new firearm purchase. (First Am. Compl., ¶ 4.) This assertion is unsupported. It is simply not so
 24 that a certificate of eligibility activates or effectuates or constitutes an ongoing background check
 25 of the certificate holder. *Cf. Jackson v. Dep’t of Justice*, 85 Cal. App. 4th 1334, 1338, 1340, 1349

26 _____
 27 ³ A person who acquired a firearm legally may lose his or her right to possess that firearm,
 28 which is then subject to repossession. See *People v. James*, 174 Cal. App. 4th 662, 665-66 (2009).

(2001) (holding that DOJ properly denied licensed firearms dealer’s application for renewal of assault weapons permit based on violations of relevant law during term of permit; issue was determined in course of processing renewal application; revocation of permit did not occur automatically).

In conclusion, the Law passes the substantial-burden test and therefore does not infringe the Second Amendment, meaning that the Court should grant the Attorney General’s motion for summary judgment as to the Second Amendment claim.

B. The Challenged Laws Survive Intermediate Scrutiny

The Ninth Circuit has *not* adopted an “intermediate scrutiny” standard applicable to Second Amendment cases.⁴ But even if this Court were to determine that intermediate scrutiny is the appropriate standard of review here, the Waiting Period Law would survive that heightened level of scrutiny.

“[I]ntermediate scrutiny requires [1] the asserted governmental end to be more than just legitimate; it must be either ‘significant,’ ‘substantial,’ or ‘important,’ and it requires [2] the ‘fit between the challenged regulation and the asserted objective be reasonable, [but] not perfect.’” *Peruta*, 758 F. Supp. 2d at 1117, quoting *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010). “The narrow tailoring 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. Cnty. of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007) (internal punctuation omitted) (holding that regulation may be considered narrowly tailored under intermediate scrutiny even if plaintiff challenging regulation can posit less drastic means of achieving state objective. The test for intermediate scrutiny can be stated in the form of a series of questions, as follows: is the law in question related to a substantial governmental interest? *See Parker*, 919 F. Supp. 2d at 1084 (stating test in form other than questions). If no, the law does

⁴ At least one local federal trial court has applied *both* intermediate scrutiny *and* rational-basis review in a Second Amendment case. *See United States v. Parker*, 919 F. Supp. 2d 1072, 1084 (E.D. Cal. 2012).

1 not pass the test. *See id.* If yes, another question comes up: is the law in question reasonably
2 adapted to achieve that interest? *See id.* If no, the law does not pass the test. *See id.* If yes, yet
3 another question comes up: does the law impose a substantial burden on the Second
4 Amendment? *See id.* If no, the law does not pass the test. If yes, the law does pass the test. *See*
5 *id.*

6 As the substantial-burden analysis above has shown, the Waiting Period Law is related to
7 the legitimate and indisputably important governmental interest in protecting public safety by
8 reducing gun violence. And, as previously noted, the Law imposes, at most, only a minor burden
9 or inconvenience on the Second Amendment. Consequently, the central question for intermediate
10 scrutiny here becomes whether the Law is reasonably adapted to achieve the governmental
11 interest in public safety.

12 The U.S. Court of Appeals for the Ninth Circuit, in other areas of jurisprudence, has upheld
13 statutes based on logic, common sense, and mere theories for how the legislatures could have
14 believed or supposed that the statutes had reasonably close connections to the ends sought. *See,*
15 *e.g., Coyote Publ'g v. Miller*, 598 F.3d 592, 598 (9th Cir. 2010) (relying on logic and “common
16 sense” to evaluate whether statutory restrictions on brother advertising were reasonably adapted
17 to achieve government end of resisting commodification of human sexuality); *Ass'n of Nat'l*
18 *Advertisers, Inc. v. Lungren*, 44 F.3d 726, 734-35 (9th Cir. 1994) (accepting theory for how
19 California law setting standards for “environmental” marketing catchphrases promotes state’s
20 interests in having consumers of products accurately informed of their contents and
21 characteristics and in having adequate stewardship of environment).

22 Here, it is beyond reasonable dispute that the Legislature reasonably could have supposed
23 that mandating a 10-day cooling-off period between application to purchase a firearm and
24 delivery of that firearm would dissuade at least some people experiencing violent impulses from
25 acting out those impulses with firearms, thereby reducing gun violence and increasing public
26 safety. Even if a person already has a firearm, limiting that person’s ability to acquire another
27 firearm can only decrease the likelihood that the person will use a firearm in an impulsive act of
28

1 violence. In sum, a cooling off period is reasonably adapted to achieve the State of California's
2 public-safety objective.

3 Similarly, the Legislature reasonably could have supposed that giving law-enforcement
4 officials 10 days to conduct a thorough background check on prospective firearms purchaser
5 would hamper some people who are not legally permitted to possess firearms – because of, e.g.,
6 their criminal histories, their mental-health histories, or restraining orders against them – in
7 acquiring them, thereby reducing gun violence and increasing public safety. See *Bickston*, 91
8 Cal. App. 3d Supp. at 31. Background checks may not stop all persons disallowed firearms from
9 obtaining them, but, again, the U.S. Constitution does not require perfect efficacy of a law for it
10 to survive intermediate scrutiny.

11 Although Plaintiffs complain about all the statutory exemptions to the Waiting Period
12 Law (First Am. Compl., ¶¶ 24-42, 69-70), these exceptions (discussed in detail below) tailor the
13 Law to fit the asserted objective, making the restriction less sweeping than otherwise, and thus
14 support the constitutionality of the law. Cf. *People v. Flores*, 169 Cal. App. 4th 568, 576-77
15 (2008) (finding exceptions to California's open-carry firearms regulations support the
16 constitutionality of the law, by tailoring it).

17 In conclusion, if the Court finds that it is appropriate to apply intermediate scrutiny to the
18 Waiting Period Law (although for the reasons stated above the Attorney General submits that
19 such analysis is not required), then the Court should conclude from that analysis that the Law
20 survives the heightened level of scrutiny. The Law is related to an indisputably important
21 governmental interest in public safety. The Law is reasonably adapted to serving that interest.
22 And the Law imposes at worst a minor burden on the Second Amendment right.

23 **II. THE ATTORNEY GENERAL IS ENTITLED TO SUMMARY JUDGMENT** 24 **OF PLAINTIFFS' FOURTEENTH-AMENDMENT CLAIM**

25 Of the Waiting Period Law, Plaintiffs claim a violation of the Fourteenth Amendment
26 Equal Protection Clause, in that certain classes of people have statutory exemptions—a total of 18
27 groups of such exemptions (First. Am. Compl., ¶¶ 25-42)—while the Individual-Person Plaintiffs
28

1 and other people do not enjoy any exemptions. However, as a matter of law, this claim of
2 Plaintiffs cannot be sustained because each exemption is supported by sufficient justification.

3 Where an equal-protection claim is based on membership in a suspect class such as race or
4 the burdening of a fundamental right, then heightened scrutiny is applied; otherwise only rational-
5 basis review applies. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277–78 (9th Cir. 2005)
6 (stating that “[w]hen no suspect class is involved and no fundamental right is burdened, we apply
7 a rational basis test to determine the legitimacy of the classifications”); (First Am. Compl., ¶ 70
8 (attacking exemptions as “arbitrary, capricious, and irrational”).)

9 Plaintiffs do not and could not truthfully assert that any of the exemptions discriminates
10 against any suspect class of people, such as racial or ethnic minorities. And the Attorney General
11 already has established that the Waiting Period Law does not burden the Second Amendment
12 right (as the Law passes even heightened scrutiny). Therefore, the Court should subject each of
13 the challenged groups of statutory exemptions to rational-basis review. Such analysis should lead
14 to conclusions that all of the exemptions survive rational-basis review.

15 The first challenged exemptions, in California Penal Code sections 26950, 27050, 27055,
16 27060, 27065, 27600, 27610, 27615, and 27650, cover, generally, peace officers who are
17 authorized to carry firearms while performing their duties as peace officers. (See First. Am.
18 Compl., ¶ 26.) The Legislature rationally could have decided that peace officers, who enforce the
19 laws and apprehend people who violate the laws, have a special need for swift access to firearms
20 to be able to do their jobs effectively. Moreover, the Legislature could reasonably conclude that
21 peace officers who need firearms quickly and may have to purchase them personally, and who are
22 already subject to stringent internal departmental regulations relating to firearms, need not be
23 subject to the additional restrictions imposed by the Waiting Period Law. These exemptions pass
24 thus rational-basis review.

25 The second challenged exemptions, in California Penal Code sections 26955 and 27655,
26 cover, generally, firearms dealers delivering firearms *other than handguns* at auctions or similar
27 events. (See First. Am. Compl., ¶ 27.) The Legislature rationally could have concluded that
28 firearms auctions or similar events often occur at temporary locations, meaning that dealers may

1 lack access to the same locations 10 days later to complete firearms transactions, so the 10-day
2 waiting period should be curbed in such instances, at least for firearms that are not handguns and
3 thus are not easy to conceal, to allow legitimate transactions to be completed. The Legislature
4 also rationally could have concluded that buyers of curio and relic firearms often acquire them at
5 auctions and similar events, and these types of firearms are relatively less lethal, or less likely to
6 be used in acts of violence or by people, such as convicted felons, prohibited from possessing
7 firearms, and so a loosening of the waiting period makes sense in this atypical circumstance.
8 Therefore, these exemptions also pass rational-basis review.

9 The third challenged exemptions, in California Penal Code sections 27110, 27125, 27710,
10 and 27725, cover, generally, dealer-to-dealer transfers of firearms. (See First. Am. Compl., ¶ 28.)
11 The Legislature rationally could have concluded that the 10-day waiting period would
12 unnecessarily double (or even triple) in length for any person who purchases a firearm from one
13 dealer that first has to obtain the firearm from another dealer before delivery to the purchaser, if
14 there was a dealer-to-dealer waiting period. Allowing swifter dealer-to-dealer transfers lets a
15 firearm reach its lawful new owner after just a 10-day waiting period, not a 20- or even 30-day
16 waiting period. Thus, these exemptions pass rational-basis review as well.

17 The fourth challenged exemptions, in California Penal Code sections 26960, 27130, 27660,
18 and 27730, cover, generally, a dealer's transfer of firearms (other than handguns) to himself or
19 herself. (See First. Am. Compl., ¶ 29.) The Legislature rationally could have concluded that
20 dealers, who are subject to many more relevant regulations and much more relevant oversight
21 than other people, and who presumably handle high volumes of firearms regularly, are
22 significantly less likely to abuse immediate access to firearms, making the 10-day waiting period
23 less crucial in their cases. Also, given a dealer's ready access to firearms from their own
24 inventory, imposing a waiting period might tempt such a person to evade the law entirely, making
25 the waiting period counterproductive. These exemptions pass rational-basis review.

26 The fifth challenged exemptions, in California Penal Code sections 27100 and 27700,
27 cover, generally, transfers of firearms between or to importers or manufacturers. (See First. Am.
28 Compl., ¶ 30.) As with dealer-to-dealer-to-buyer transactions, the Legislature rationally could

1 have concluded that the 10-day waiting period would unnecessarily double (or even triple) in
2 length for any person who purchases a firearm that was recently in the possession of an importer
3 or manufacturer and that must go first to a dealer and then to the purchaser. Allowing more
4 expedited importer and/or manufacturer transfers is consistent with allowing a firearm to reach its
5 purchaser after just a 10-day waiting period. These exemptions pass rational-basis review.

6 The sixth through eleventh and eighteenth challenged exemptions, in California Penal Code
7 sections 26965, 26970, 27140, 27665, 27740, and 27670, cover, generally, people with permits
8 for various kinds of unusual or unusually dangerous weapons (short barrel rifles, short barrel
9 shotguns, assault weapons, machineguns, destructive devices, curio and relic firearms, cane guns,
10 firearms that are not immediately recognizable as firearms, undetectable firearms, wallet guns,
11 unconventional pistols, and zip guns). (See First. Am. Compl., ¶¶ 31-26, 43.) The Legislature
12 could have rationally concluded that people who have been deemed authorized to have such
13 unusual or unusually dangerous weapons are more likely to be (1) adept at using safely, and (2)
14 especially trustworthy with, less dangerous (albeit still potentially deadly) weapons, such that a
15 10-day waiting period for purchases of more ordinary weapons would be less necessary. These
16 exemptions pass rational-basis review.

17 The twelfth challenged exemptions, in California Penal Code sections 27105 and 27705,
18 cover, generally, transactions involving firearms serviced or repaired by a gunsmith. (See First.
19 Am. Compl., ¶ 37.) The Legislature rationally could have concluded that people bringing
20 firearms to gunsmiths for repairs are not seeking immediate access to firearms for unlawful
21 reasons, because these people are voluntarily giving up immediate access to firearms, possibly for
22 longer than 10 days, such that a 10-day waiting period delaying return of the firearms is less
23 necessary. These exemptions pass rational-basis review.

24 The thirteenth challenged exemptions, in California Penal Code sections 27115 and
25 27715, cover, generally, dealer sales to persons residing out of state. (See First. Am. Compl., ¶
26 38.) The Legislature rationally could have preferred to avoid a potential conflict with the
27 dormant commerce doctrine (*see Nat'l Ass'n of Optometrists and Opticians v. Harris*, 682 F.3d
28 1144, 1147-48 (9th Cir. 2012)) in regulation of interstate firearms transactions via a 10-day

1 waiting period. Moreover, the Legislature could reasonably conclude that the foreign
 2 jurisdiction's laws would provide sufficient controls, including waiting periods. These
 3 exemptions pass rational-basis review.

4 The fourteenth challenged exemptions, in California Penal Code sections 27120 and
 5 27720, cover, generally, firearms deliveries to wholesalers. (See First. Am. Compl., ¶ 39.) As
 6 suggested above for dealer-to-dealer transactions and transactions involving importers or
 7 manufacturers, the Legislature rationally could have concluded that the 10-day waiting period
 8 would unnecessarily double (or even triple) in length for any person who purchases a firearm that
 9 was recently in the possession of a wholesaler, and has to go first to a dealer and then to the
 10 purchaser. Allowing swifter wholesaler-to-retailer transfers would allow a firearm to reach its
 11 purchaser after just a 10-day waiting period, not a 20- or even 30-day waiting period. These
 12 exemptions pass rational-basis review.

13 The fifteenth through seventeenth challenged exemptions, in California Penal Code
 14 sections 27000, 27005, 27135, 27735, 27745, and 27750 cover, generally, certain regulated loans
 15 of firearms, for such purposes as target shooting and licensed target-shooting facilities. (See
 16 First. Am. Compl., ¶¶ 40-42.) The Legislature rationally could have concluded that prompt, well-
 17 regulated lending of firearms is, as a practical matter, necessary for certain lawful businesses,
 18 such as licensed target-shooting facilities. These exemptions pass rational-basis review. Also,
 19 the Legislature rationally could have concluded that because a loan of a firearm is, by definition,
 20 for a limited time period, the lender of a firearm is more likely to have a personal relationship
 21 with the borrower, and the lender of a firearm has an incentive to assure safe return receipt of the
 22 firearm, a loosening of the waiting-period restriction is reasonable in a loan scenario.

23 In sum, Plaintiffs' multi-part claim under the Fourteenth Amendment fails in all respects,
 24 and the Court should grant summary judgment in favor of the Attorney General on this claim.

25 CONCLUSION

26 Enforcement of California's statutory 10-day waiting period does not substantially burden
 27 any person's Second Amendment right, and does not abridge the Second Amendment under any
 28

1 appropriate standard of review. Plaintiffs, who possess firearms already, are complaining about
2 the mere inconvenience of a waiting period that is well-justified as a public-safety measure.
3 Similarly, there is no violation of the Fourteenth Amendment merely because the California
4 Legislature, in tailoring the waiting period narrowly, exempted certain groups of people from
5 the waiting period. Each exemption is well-justified. Therefore, the Court should grant the
6 Attorney General's motion for summary judgment in its entirety.

7 Dated: September 25, 2013

Respectfully Submitted,

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12 /s/
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

**JEFF SILVESTER, MICHAEL POESCHL,
BRANDON COMBS, THE CALGUNS
FOUNDATION, INC., a non-profit
organization, and THE SECOND
AMENDMENT FOUNDATION, INC., a
non-profit organization,**

Plaintiffs,

v.

**KAMALA HARRIS, Attorney General of
California (in her official capacity), and
DOES 1 to 20,**

Defendants.

1:11-cv-02137-AWI-SKO

**DECLARATION OF JONATHAN M.
EISENBERG IN SUPPORT OF
DEFENDANT CALIFORNIA
ATTORNEY GENERAL KAMALA D.
HARRIS'S MOTION FOR SUMMARY
JUDGMENT (FED. R. CIV. P. 56) (FED.
R. CIV. P. 56)**

Hearing Date: October 28, 2013
Hearing Time: 1:30 p.m.
Trial Date: March 25, 2014
Action Filed: December 23, 2011

I, Jonathan M. Eisenberg, declare as follows:

1. I have personal knowledge of the following facts, except where I have just information and belief, as indicated, and, if called as a witness, I could and would testify competently to the facts.

2. I am an attorney admitted to practice law in California and before the present Court. I am one of the attorneys of record for Kamala D. Harris, Attorney General of the State of

1 California (the “Attorney General”), in the instant case, adverse to Plaintiffs Jeffrey A. Silvester
2 (“Silvester”), Brandon S. Combs (“Combs”), The Calguns Foundation, Inc., and The Second
3 Amendment Foundation, Inc. (Together all plaintiffs are “Plaintiffs.”)

4 3. In November 2012, the discovery phase of this case, I propounded a set of
5 interrogatories on Silvester and another set of interrogatories on Combs. In January 2013, both
6 Silvester and Combs returned verified interrogatory responses. Attached hereto as Exhibit A is a
7 true and correct copy of certain pages, including the verification page, from Silvester’s
8 interrogatory responses. Attached hereto as Exhibit B is a true and correct copy of certain pages,
9 including the verification page, from Combs’s interrogatory responses.

10 4. In May 2013, I deposed both Silvester and Combs in this case. I had a court
11 reporter transcribe what was said at each deposition and send me the transcript. Attached hereto
12 as Exhibit C is a true and correct copy of certain pages of the transcript of the Silvester
13 deposition. Attached hereto as Exhibit D is a true and correct copy of certain pages of the
14 transcript of the Combs deposition.

15 I declare under the penalty of perjury that the foregoing is true and correct and that I
16 signed this declaration on September 25, 2013, at Los Angeles, California.

17
18 /s/

19 Jonathan M. Eisenberg
20
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27
28

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3 27201 Puerta Real, Suite 300
4 Mission Viejo, CA 92691
5 Tel 949.436.GUNS/Fax 949.288.6894
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7 Donald E.J. Kilmer, Jr. (Calif. Bar No. 179986)
8 Law Office of Donald Kilmer, A.P.C.
9 1645 Willow Street, Suite 150
10 San Jose, CA 95125
11 408.364.84889/Fax 408.264.8487
12 Email: Don@DKLawOffice.com

13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
15 **FRESNO DIVISION**

16 JEFF SILVESTER, MICHAEL POESCHL,
17 BRANDON COMBS, THE CALGUNS
18 FOUNDATION, INC., a non-profit
19 organization, and THE SECOND
20 AMENDMENT FOUNDATION, INC., a
21 non-profit organization,

22 Plaintiffs,

23 vs.

24 KAMALA HARRIS, Attorney General of
25 California (in her official capacity), and
26 DOES 1 to 20,

27 Defendant.

Case No: 1:11-cv-02137-AWI-SKO

**PLAINTIFF JEFF SILVESTER'S
RESPONSE TO DEFENDANT
KAMALA D. HARRIS'S FIRST SET OF
INTERROGATORIES**

28 Exhibit A

1 PROPOUNDING PARTY: Defendant Kamala D. Harris
2 RESPONDING PARTY: Plaintiff Jeff Silvester
3 SET NUMBER: One (1)
4

5 **RESPONSES TO INTERROGATORIES**

6 **INTERROGATORY NO. 1**

7 State your full name, date of birth, home address, and Social Security number.

8 **RESPONSE TO INTERROGATORY NO. 1**

9 **OBJECTION:** This interrogatory counts as four separate and distinct interrogatories.
10 Moreover, this request is objectionable as it is not calculated to lead to the discovery of
11 admissible evidence. This request seeks privileged information, including Plaintiff's Social
12 Security number and birth date. (*See* Fed. R. Civ. Proc. §5.2.)

13 **RESPONSE:** Without waiving the above stated objections, Plaintiff responds as follows:
14 Jeffery Sherman Silvester; 1979; N. Bordeaux Way, Hanford CA, 93230; the last four digits of
15 my Social Security number are 4487.

16 **INTERROGATORY NO. 2**

17 How many firearms are usually kept at your home?

18 **RESPONSE TO INTERROGATORY NO. 2**

19 **OBJECTION:** This request is not reasonably calculated to seek the discovery of
20 admissible evidence. Moreover, this request seeks information that is irrelevant to the matter at
21 hand. This request seeks privileged information as it relates to the number of firearms kept at
22 Plaintiff's home. (*See* U.S. Const. amends I, IV, V, XIV; Cal. Const. art I, §1; and 18 U.S.C.
23 926(a), which states: "No such rule or regulation prescribed [by the Attorney General] after the
24 date of the enactment of the Firearms Owners Protection Act may require that records required to
25 be maintained under this chapter or any portion of the contents of such records, be recorded at or
26 transferred to a facility owned, managed, or controlled by the United States or any State or any
27 political subdivision thereof, nor that any system of registration of firearms, firearms owners, or
28 firearms transactions or disposition be established. Nothing in this section expands or restricts

1 the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal
2 investigation." Thus, there is a clear intent to secure gun owners' privacy as it relates to their
3 firearm ownership. The civil action at issue herein cannot be used to subvert those privacy
4 rights.

5 RESPONSE: Without waiving the above stated objections, Plaintiff responds by stating
6 that, in general, I keep at least one firearm within the home.

7 **INTERROGATORY NO. 3**

8 How many firearms suitable for self-defense are usually kept at your home?

9 **RESPONSE TO INTERROGATORY NO. 3**

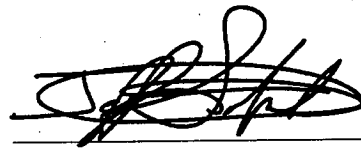
10 OBJECTION: This request is not reasonably calculated to seek the discovery of
11 admissible evidence. This request is also so vague or ambiguous as to be burdensome or
12 oppressive as to the meaning of "suitable for self-defense." Moreover, Plaintiff would have to
13 speculate as to the meaning of the phrase "suitable for self-defense." Firearms are tools. While
14 one firearm may be suitable for self-defense in one scenario, it may not be suitable for self-
15 defense in another scenario. As such, the term "suitable for self-defense" is too vague and
16 ambiguous to properly respond to. Moreover, this request seeks information that is irrelevant to
17 the matter at hand. This request seeks privileged information as it relates to the number of
18 firearms kept at Plaintiff's home. (See U.S. Const. amends I, IV, V, XIV; Cal. Const. art I, §1;
19 and 18 U.S.C. 926(a), which states: "No such rule or regulation prescribed [by the Attorney
20 General] after the date of the enactment of the Firearms Owners Protection Act may require that
21 records required to be maintained under this chapter or any portion of the contents of such
22 records, be recorded at or transferred to a facility owned, managed, or controlled by the United
23 States or any State or any political subdivision thereof, nor that any system of registration of
24 firearms, firearms owners, or firearms transactions or disposition be established. Nothing in this
25 section expands or restricts the Secretary's authority to inquire into the disposition of any firearm
26 in the course of a criminal investigation." Thus, there is a clear intent to secure gun owners'
27 privacy as it relates to their firearm ownership. The civil action at issue herein cannot be used to
28 subvert those privacy rights.

VERIFICATION

JEFF SILVESTER declares:

1. I am a plaintiff in the above-captioned action;
2. I have read the foregoing "PLAINTIFF JEFF SILVESTER'S RESPONSE TO DEFENDANT KAMALA D. HARRIS'S FIRST SET OF INTERROGATORIES" ("The Response") and know its contents. I am informed and believed that the matters set forth in the Response are true and accurate, and on that ground I allege, to the best of my knowledge and information, that the matters therein stated are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Verification was executed on January 28, 2013, at Hanford, CA, California.



JEFF SILVESTER

1 Jason A. Davis (Calif. Bar No. 224250)
2 Davis & Associates
3 27201 Puerta Real, Suite 300
4 Mission Viejo, CA 92691
5 Tel 949.436.GUNS/Fax 949.288.6894
6 Email: Jason@CalGunLawyers.com

7 Donald E.J. Kilmer, Jr. (Calif. Bar No. 179986)
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11 408.364.84889/Fax 408.264.8487
12 Email: Don@DKLawOffice.com

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

JEFF SILVESTER, MICHAEL POESCHL,
BRANDON COMBS, THE CALGUNS
FOUNDATION, INC., a non-profit
organization, and THE SECOND
AMENDMENT FOUNDATION, INC., a
non-profit organization,

Plaintiffs,

vs.

KAMALA HARRIS, Attorney General of
California (in her official capacity), and
DOES 1 to 20,

Defendant.

Case No: 1:11-cv-02137-AWI-SKO

**PLAINTIFF MICHAEL POESCHL'S
RESPONSE TO DEFENDANT
KAMALA D. HARRIS'S FIRST SET OF
INTERROGATORIES**

Exhibit B

PROUPOUNDING PARTY: Defendant Kamala D. Harris

RESPONDING PARTY: Plaintiff Michael Poeschl

SET NUMBER: One (1)

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1

State your full name, date of birth, home address, and Social Security number.

RESPONSE TO INTERROGATORY NO. 1

OBJECTION: This interrogatory counts as four separate and distinct interrogatories. Moreover, this request is objectionable as it is not calculated to lead to the discovery of admissible evidence. This request seeks privileged information, including Plaintiff's Social Security number and birth date. (*See* Fed. R. Civ. Proc. §5.2.)

RESPONSE: Without waiving the above stated objections, Plaintiff responds as follows: Michael Gardner Poeschl; 1974; 27163 El Moro, Mission Viejo, CA 92691; the last four digits of my Social Security number are 1039.

INTERROGATORY NO. 2

How many firearms are usually kept at your home?

RESPONSE TO INTERROGATORY NO. 2

OBJECTION: This request is not reasonably calculated to seek the discovery of admissible evidence. Moreover, this request seeks information that is irrelevant to the matter at hand. This request seeks privileged information as it relates to the number of firearms kept at Plaintiff's home. (*See* U.S. Const. amends I, IV, V, XIV; Cal. Const. art I, §1; and 18 U.S.C. 926(a), which states: "No such rule or regulation prescribed [by the Attorney General] after the date of the enactment of the Firearms Owners Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or

1 firearms transactions or disposition be established. Nothing in this section expands or restricts
2 the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal
3 investigation." Thus, there is a clear intent to secure gun owners' privacy as it relates to their
4 firearm ownership. The civil action at issue herein cannot be used to subvert those privacy
5 rights.

6 RESPONSE: Without waiving the above stated objections, Plaintiff responds by stating
7 that, in general, I keep at least one firearm within the home.
8

9 **INTERROGATORY NO. 3**

10 How many firearms suitable for self-defense are usually kept at your home?

11 **RESPONSE TO INTERROGATORY NO. 3**

12 OBJECTION: This request is not reasonably calculated to seek the discovery of
13 admissible evidence. This request is also so vague or ambiguous as to be burdensome or
14 oppressive as to the meaning of "suitable for self-defense." Moreover, Plaintiff would have to
15 speculate as to the meaning of the phrase "suitable for self-defense." Firearms are tools. While
16 one firearm may be suitable for self-defense in one scenario, it may not be suitable for self-
17 defense in another scenario. As such, the term "suitable for self-defense" is too vague and
18 ambiguous to properly respond to. Moreover, this request seeks information that is irrelevant to
19 the matter at hand. This request seeks privileged information as it relates to the number of
20 firearms kept at Plaintiff's home. (See U.S. Const. amends I, IV, V, XIV; Cal. Const. art I, §1;
21 and 18 U.S.C. 926(a), which states: "No such rule or regulation prescribed [by the Attorney
22 General] after the date of the enactment of the Firearms Owners Protection Act may require that
23 records required to be maintained under this chapter or any portion of the contents of such
24 records, be recorded at or transferred to a facility owned, managed, or controlled by the United
25 States or any State or any political subdivision thereof, nor that any system of registration of
26 firearms, firearms owners, or firearms transactions or disposition be established. Nothing in this
27 section expands or restricts the Secretary's authority to inquire into the disposition of any firearm
28 in the course of a criminal investigation." Thus, there is a clear intent to secure gun owners'

1 In fact, the California Department of Justice had determined alternative methods that
2 eliminate delays upon law abiding firearm owners while ensuring public safety as early as 1991.
3 In its AB 497 Alternative Feasibility Studies: Report of Findings (1991), the Department of
4 Justice identified multiple methods of performing proper background checks such that the
5 persons in prohibited categories would not be allowed to purchase a firearm from a licensed
6 California firearm dealer while imposing minimal infringement on gun owners' rights to
7 purchase and possess firearms. As I am a verifiable law-abiding firearm owner, there is no
8 justifiable reason to delay my acquisition of a firearm I already own.

9 If I were required to wait 5 days between purchasing a firearm and taking delivery of a
10 firearm, I would thereby be deprived of the use, custody, and control of my personal property.
11 The delay would also deny me the ability to defend self, family, and home with said firearm that
12 I already own; the hypothetical waiting period mandates a brief window of 25 days from which I
13 must return to obtain physical possession of property that I already own, causing an additional
14 increased 5 day delay and added expenses of Dealer Record of Sale fees, storage fees, and
15 transportation fees when I am unavailable to take physical possession of the firearm within the
16 25 day window; causes increased travel expenses upon firearm purchases coinciding with
17 distance from my home to the licensed firearm dealer premises due to the requirement that I must
18 make a second trip to receive custody of the firearm purchased; limits my out-of-town purchases
19 and gun show purchases; and limits the market of firearms available to areas I am willing to
20 travel to twice during a period of at least 5 days and at most 30 days; causes added burden and
21 expense of locating and paying another more local dealer who may be willing, but is not
22 statutorily obligated, to process a firearms transfer originating at a competitor's licensed firearm
23 dealer; and causes me to lose the opportunity cost of the time spent on the second trip to receive
24 a firearm I already own.

25
26 **INTERROGATORY NO. 16**

27 Describe in full and complete detail all expenses that you have incurred to acquire
28 firearms because of California Penal Code section 26815(a) and its "waiting period" (between

1 purchase and delivery of a firearm).

2 **RESPONSE TO INTERROGATORY NO. 16**

3 RESPONSE: I have lost the opportunity costs to engage in business and other activities
4 during the time it took me for each and every second trip to the licensed firearms dealer to take
5 possession, custody, and control of each firearm I own.

6 I have lost the opportunity to purchase firearms due to an inability to make a second trip.

7 I have incurred expenses, including shipping expenses, additional dealer transfer fees,
8 increased firearm prices due to lack of local competition, additional fuel costs, wear and tear on
9 my vehicle[s] necessary for a return trip to the licensed dealer to receive my firearm. On
10 information and belief, I have spent approximately \$1,500.00 on such expenses.

11 I have incurred additional costs of having to resubmit a Dealer Record of Sale application
12 due to scheduling conflicts preventing me from returning to the store to receive my firearm
13 within the temporary window of availability. Upon information and belief, I have spent
14 approximately \$100.00 on resubmission fees.

15
16 **INTERROGATORY NO. 17**

17 Describe in full and complete detail all expenses that you have incurred to acquire
18 firearms because of California Penal Code section 27540 and its "waiting period" (between
19 purchase and delivery of a firearm).

20 **RESPONSE TO INTERROGATORY NO. 17**

21 RESPONSE: I have lost the opportunity costs to engage in business and other activities
22 during the time it took me for each and every second trip to the licensed firearms dealer to take
23 possession, custody, and control of each firearm I own.

24 I have lost the opportunity to purchase firearms due to an inability to make a second trip.

25 I have incurred expenses, including shipping expenses, additional dealer transfer fees,
26 increased firearm prices due to lack of local competition, additional fuel costs, wear and tear on
27 my vehicle[s] necessary for a return trip to the licensed dealer to receive my firearm. On
28 information and belief, I have spent approximately \$1,500.00 on such expenses.

1 I have incurred additional costs of having to resubmit a Dealer Record of Sale application
2 due to scheduling conflicts preventing me from returning to the store to receive my firearm
3 within the temporary window of availability. Upon information and belief, I have spent
4 approximately \$100.00 on resubmission fees.
5

6 **INTERROGATORY NO. 18**

7 State the longest distance you have traveled, in the last 10 years, from your home to a
8 licensed firearms retailer to acquire a firearm.

9 **RESPONSE TO INTERROGATORY NO. 18**

10 RESPONSE: Approximately 764 miles.

11 **INTERROGATORY NO. 19**

12 State the distances from your home, in miles, of the three licensed firearms dealers that
13 are presently closest to your home.

14 **RESPONSE TO INTERROGATORY NO. 19**

15 OBJECTION: This request is so vague or ambiguous as to be burdensome or oppressive
16 as to the meaning of "licensed firearm dealers." Moreover, Plaintiff would have to speculate as
17 to the meaning of the phrase "licensed firearm dealers." This interrogatory provides no definition
18 of what "licenses" or which category of "firearm dealers" this interrogatory refers to. Neither
19 Department of Justice nor any other entity publishes a list or makes a list available of persons
20 who are licensed under California law to transfer firearms – therefore it is impossible for me to
21 know with any certainty who the three licensed firearm dealers that are presently closest to my
22 home.

23 RESPONSE: Without waiving the above referenced objection, Plaintiff responds: To the
24 best of my knowledge, and on information and belief, the three firearm retailers open to the
25 public that are presently closest to my home are: PRK Arms, Spencer's Firearms, and Herb
26 Bauer's Sporting Goods. The distances from these locations to my home are unknown.

27 **INTERROGATORY NO. 20**

28 State the name and World Wide Web address of each Internet seller of firearms from

VERIFICATION

MICHAEL POESCHL declares:

1. I am a plaintiff in the above-captioned action;
2. I have read the foregoing "PLAINTIFF MICHAEL POESCHL'S RESPONSE TO DEFENDANT KAMALA D. HARRIS'S FIRST SET OF INTERROGATORIES" ("The Response") and know its contents. I am informed and believed that the matters set forth in the Response are true and accurate, and on that ground I allege, to the best of my knowledge and information, that the matters therein stated are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Verification was executed on January 28, 2013, at Mission Viejo, California.



MICHAEL POESCHL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

---oOo---

JEFF SILVESTER, MICHAEL POESCHL,)
BRANDON COMPS, The CALGUNS)
FOUNDATION, INC., a non-profit)
organization, and THE SECOND)
AMENDMENT FOUNDATION, INC., a)
non-profit organization,)

Plaintiffs,)

vs.)

KAMALA HARRIS, Attorney General)
of California (in her official)
capacity), and DOES 1 to 20,)

Defendants.)
-----)

DEPOSITION OF
JEFF SILVESTER
FRESNO, CALIFORNIA
MAY 9, 2013

ATKINSON-BAKER, INC.
COURT REPORTERS
(800) 288-3376
WWW.DEPO.COM

REPORTED BY: THERESA G. MENDOZA, CSR NO. 12338
FILE NO.: A703C37

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

---oOo---

JEFF SILVESTER, MICHAEL POESCHL,)
BRANDON COMPS, The CALGUNS)
FOUNDATION, INC., a non-profit)
organization, and THE SECOND)
AMENDMENT FOUNDATION, INC., a)
non-profit organization,)

Plaintiffs,)

vs.)

KAMALA HARRIS, Attorney General)
of California (in her official)
capacity), and DOES 1 to 20,)

Defendants.)
-----)

No. 1:11CV02137AWISKO

Deposition of JEFF SILVESTER, taken on
behalf of Defendants, at 2550 Mariposa Mall, Fresno,
California, commencing at 8:57 a.m., Thursday, May 9,
2013 before Theresa G. Mendoza, CSR No. 12338.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

OTTEN & JOYCE, LLP
BY: VICTOR J. OTTEN, ESQUIRE
3620 Pacific Coast Highway, Suite 100
Torrance, California 90505

FOR THE DEFENDANTS:

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
BY: JONATHAN M. EISENBERG, DEPUTY
300 South Spring Street, Suite 1702
Los Angeles, California 90013

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
DIVISION OF LAW ENFORCEMENT
BUREAU OF FIREARMS
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I N D E X

WITNESS: JEFF SILVESTER

EXAMINATION	PAGE
BY MR. EISENBERG	5
BY MR. OTTEN	130

EXHIBITS

LETTER	PLAINTIFF'S DESCRIPTION	PAGE
	(NONE)	

NUMBER	DEFENDANTS' DESCRIPTION	PAGE
1 -	Stipulation agreement E-mails	16
2 -	Stipulated Protective Order	16
3 -	Silver Start Custom Leather Posts	20
4 -	First Amended Complaint	38
5 -	Plaintiff's Initial Disclosures	80
6 -	Response to First Set of Interrogatories	86
7 -	Calguns Foundation Posts	114

QUESTIONS WITNESS WAS INSTRUCTED NOT TO ANSWER:

(NONE)

INFORMATION TO BE SUPPLIED:

(NONE)

1 Q. Have there been firearms that you wanted
2 to purchase but were unable to because of the ten-day
3 waiting period?

4 A. Yes.

5 Q. More than one firearm?

6 A. Yes.

7 Q. How many firearms have you been unable to
8 purchase because of the ten-day waiting period?

9 A. At least three.

10 Q. When is the most recent time of those
11 three that you wanted to purchase and you weren't able
12 because of the ten-day waiting period?

13 A. I'm unsure of the exact date, but late
14 last year.

15 Q. Okay.

16 A. So maybe November.

17 Q. You're doing just fine in terms if you
18 don't remember the specific date, giving me your best
19 estimate. That's just what I want and I appreciate
20 that.

21 A. Okay.

22 Q. On that occasion, what, what was the
23 reason -- sorry, on that occasion, how did the ten-day
24 waiting period make you unable to complete the
25 acquisition of that firearm?

1 A. Can you ask that question in another way?

2 Q. Okay. What was the reason that you were
3 unable to finish the purchase of the acquisition of
4 that firearm?

5 A. Return trips make it financially
6 unfeasible.

7 Q. So this purchase was of a firearm that was
8 far away from your home?

9 A. Correct.

10 Q. How far way?

11 A. 200 or 300 miles.

12 Q. Where did you -- what town was it that
13 were you trying to make that purchase?

14 A. The particular firearm was located up
15 north in the Redding area. I don't recall the exact
16 city.

17 Q. Were you purchasing from a store, as
18 opposed to say a gun show?

19 A. The person that owned the gun was a
20 private party, but all sales have to go through an FFL.

21 Q. Right. Did you travel from your home, the
22 200 or 300 miles north for the purpose of making that
23 firearm purchase?

24 A. If I would have made the purchase, yeah.

25 Q. In other words, when you went on that trip

1 the point was to go buy a firearm at that location?

2 A. Yes.

3 MR. OTTEN: He didn't say he went on a trip, I
4 don't think.

5 Do you understand what he's asking you?

6 THE WITNESS: No.

7 MR. EISENBERG:

8 Q. All right. So you live in Hanford, and
9 you went north a couple hundred miles to this private
10 party, I guess it was the person's house?

11 A. I didn't make the trip.

12 Q. You didn't make the trip?

13 A. I wasn't able to purchase the firearm.

14 Q. How did you become aware of the -- pardon
15 me. I didn't mean to interrupt you.

16 A. That's okay. I just couldn't make the
17 trip because of the distance.

18 Q. Okay. How did you become aware of the
19 existence of this firearm?

20 A. Friends.

21 Q. And so what, what kind of firearm was it?

22 A. I believe it was a Heritage .22 Revolver.

23 Q. Did you attempt to find that firearm at a
24 closer location?

25 A. I've been looking for one and had not

1 found one until I found this one.

2 Q. How did you communicate with the owner of
3 the firearm, the person that you might have bought it
4 from?

5 A. Telephone once and e-mail, instant message
6 over the Internet.

7 Q. Were you aware when you were communicating
8 with him that he was located a few hundred miles away?

9 A. Yes.

10 Q. Did you ever travel to his physical
11 location and look at the firearm?

12 A. No.

13 Q. Were there some characteristics about that
14 firearm that were unique that you needed that firearm,
15 as opposed to another firearm?

16 A. Yes.

17 Q. What were those characteristics?

18 A. Good price.

19 Q. Good price. Any other characteristics?

20 A. Suited my needs. It was what I was
21 looking for.

22 Q. Right. So what needs were you trying to
23 satisfy by possibly obtaining --

24 A. Add a .22 --

25 Q. Can you let me finish my question.

1 A. I apologize.

2 Q. It's particularly difficult for the Court
3 Reporter, if two people or more are talking at the same
4 time.

5 MR. EISENBERG: Can you read back the last
6 question.

7 (Whereupon the last question was read back.)

8 MR. EISENBERG:

9 Q. The firearm.

10 A. Add a .22 to my available firearms.

11 Q. I guess I'm trying get more information
12 about why you needed that .22, as opposed to some other
13 firearm that you probably could obtain locally.

14 A. I'm not a rich man. I go where the prices
15 are good.

16 Q. And so again, you did not actually ever
17 travel up there to try to complete the purchase?

18 A. No.

19 Q. Did you think about having the firearm
20 delivered to you by the mail or some other method where
21 you wouldn't have had to personally travel up north to
22 get the gun?

23 A. Let me clarify. Did I consider it?

24 Q. Yes.

25 A. Yes.

1 Q. Okay. Is there a reason that you did not
2 try to use that option?

3 A. Very cost preventative.

4 Q. So did you get a price on how much it
5 would cost to transport the firearm?

6 A. Yes.

7 Q. What was the price; do you remember?

8 A. Can you clarify, are you looking for the
9 shipping cost?

10 Q. Yes.

11 A. Or the transfer cost from another dealer?

12 Q. First, shipping cost, please.

13 A. Was minimal maybe \$20.

14 Q. And you looked into having the owner ship
15 the firearm to another licensed, to a licensed dealer?

16 A. Correct.

17 Q. And there were fees associated with that
18 transfer?

19 A. Correct.

20 Q. How much were the fees, do you --

21 A. In excess of \$100.

22 Q. Excess of \$100, okay. I believe you said
23 there were three times that you said you can recall
24 that you weren't able to purchase firearms because of
25 the ten-day waiting period?

1 A. Uh-huh.

2 Q. So let me move back to the second most
3 recent time.

4 A. Okay.

5 Q. What firearm were you attempting to acquire
6 at that time?

7 A. I believe at that time I was looking for a
8 Kel-Tec PF9.

9 Q. Would that be the same firearm that you
10 mentioned in that blog post?

11 A. No.

12 Q. It's the same kind of gun, correct?

13 A. Correct.

14 Q. So for this firearm that was a Kel-Tec PF9
15 that you have tried to purchase but ultimately didn't,
16 when were you trying to make that purchase?

17 A. Sometime before this blog post.

18 Q. And how far away was the gun, from your
19 house when you were trying to purchase it?

20 A. In that situation, it was in LA. So,
21 whatever the distance between here and LA.

22 Q. How did you become aware of the existence
23 of that Kel-Tec PF9?

24 A. Online classified ad.

25 Q. What web site?

1 A. I look at several, and I don't
2 specifically recall which one.

3 Q. Okay. Which are the ones, which are the
4 web sites that you generally look at, I guess when
5 you're looking to acquire firearms?

6 A. Uh-huh.

7 Q. What are the names of those web sites?

8 A. I have looked at in the past Calguns.net.
9 I have looked at, I have looked at craigslist before,
10 and there's a third that I do not recall the name to.

11 Q. This is not a memory contest, so don't --

12 A. There is a third one, but without looking
13 at my e-mail, I can't --

14 Q. That's fine. If you happen to remember it
15 later --

16 A. I'll be happy to forward it.

17 Q. Or even later today. If you say, oh, I
18 remember now, we can have you add that to the record.
19 But again, this deposition is not a memory contest.
20 When you have found out about the existence of the gun,
21 did you find out it was located in the LA area?

22 A. Yes.

23 Q. Was it your understanding that you could
24 not find that kind of gun, a Kel-Tec PF9, locally to
25 your house?

1 A. Yeah.

2 Q. What was the reason or reasons that you
3 wanted to have a Kel-Tec PF9?

4 A. Portability.

5 Q. Do you have other handguns?

6 A. Yes.

7 Q. And you had other handguns at the time?

8 A. Yes.

9 Q. Is there something about the Kel-Tec PF9
10 that makes it more portable than the handguns you have
11 already?

12 A. It is slimmer and smaller.

13 Q. Now, did you travel to Los Angeles to look
14 for, you know, to try to obtain that firearm, the Kel-
15 Tec PF9?

16 A. No.

17 Q. Did you communicate with the person that
18 had the gun?

19 A. Yes.

20 Q. What means of communication did you use?

21 A. Online instant message and e-mail.

22 Q. And forgive me if I've asked you this
23 question already, what was the reason that you did not
24 ultimately purchase the firearm, the Kel-Tec PF9?

25 A. The seller and I couldn't resolve the

1 distance terms. He wanted to schedule something in
2 between where we could meet, and we couldn't work it
3 out.

4 Q. What was the problem working out a meeting
5 place?

6 A. He wasn't willing.

7 Q. He wasn't willing to travel?

8 A. Correct.

9 Q. So in other words, you said I'll travel
10 halfway and he said no, or something like that?

11 A. Something like that.

12 Q. So he said -- it was a he, first of all?

13 A. Yes. I'm pretty sure.

14 Q. And he said you must come to my house --

15 A. Correct.

16 Q. -- to obtain it.

17 A. To his FFL. Sorry to interrupt.

18 Q. Did you consider, you know, using the mail
19 or some other means to deliver the Kel-Tec PF9?

20 A. Not at that time.

21 Q. Were you aware that there -- at the time
22 were you aware that you possibly could have had the gun
23 delivered to you other than going out and getting it --

24 A. Yes.

25 Q. -- in person. And so is there any reason

1 that you didn't pursue that option to obtain the Kel-
2 Tec PF9?

3 A. I had heard it was financially impossible.

4 Q. Did you, did you actually price it?

5 A. Not that time.

6 Q. So you are saying you heard it was --

7 A. Uh-huh.

8 Q. Where did you hear that information?

9 A. Friends in the community.

10 Q. And what was your understanding of the
11 cost -- let's be all inclusive, say transfer fees,
12 shipping cost, everything, what was that amount that
13 you thought the price would be?

14 A. To my understanding, it was going to cost
15 at least \$150 to have it shipped.

16 Q. What was the price that was being asked
17 for that Kel-Tec PF9?

18 A. I don't recall specifically.

19 Q. Was the price of the firearm alone not
20 including another cost more or less than \$150?

21 A. More.

22 Q. Do you recall a range, the best -- sorry.
23 Give me the best guess as to the price at the time.

24 A. Between 500 and 600 for the gun alone.

25 Q. So you had enough money to purchase the

1 gun?

2 A. Yes.

3 Q. But you did not have enough money to pay
4 the additional fees that would be required, if you were
5 going to have it brought to you?

6 A. Correct.

7 Q. Let's move back to the first firearm
8 purchase that you say you were not able to complete it
9 because of the ten-day waiting period. What kind of
10 gun were you trying to purchase at that time, or
11 rather, in that instance?

12 A. Are we talking about the .22 from up
13 north? What are we talking about?

14 Q. We talked about the most recent one.

15 A. Okay.

16 Q. Which is the one up north, 2, 300 miles away.
17 I forget the town.

18 A. Uh-huh.

19 Q. The Kel-Tec PF9.

20 A. Okay.

21 Q. You said there was another one?

22 A. Uh-huh.

23 Q. The attempt of purchase was earlier in
24 time.

25 A. Correct.

1 Q. So for that firearm, what kind of firearm
2 was it?

3 A. I believe it was a long rifle AR-15.

4 Q. Before what -- sorry. What year were you
5 trying to make that purchase?

6 A. Best guess, 2009.

7 Q. And where was this firearm located?

8 A. I think this one was in the LA area also.

9 Q. Was, was this firearm owned by the same
10 person who you almost bought the Kel-Tec PF9 from?

11 A. No.

12 Q. It just happened to be from the same
13 place, the same general place?

14 A. Yes.

15 Q. Okay. How did you find out about the
16 existence of the AR-15?

17 A. Online classified ads.

18 Q. And so the person selling was a private
19 seller?

20 A. Yes. That may -- I don't recall
21 specifically. It could have been a dealer.

22 Q. And so do you recall if you looked up this
23 gun on the Internet and found it listed at an, at a
24 retailer's Internet site?

25 A. I'm sorry, can you please ask that --

1 Q. When you found out about the existence of
2 this gun, it was because you saw a listing for it at
3 an, at a firearm retailer's web site?

4 A. No. That's not the way I found out about
5 the gun.

6 Q. Okay. Did you communicate with the
7 potential seller?

8 A. Yes.

9 Q. What were your means of communication?

10 A. E-mail, online instant messaging.

11 Q. And what was the reason that you were
12 ultimately unable to complete the purchase? What were
13 the reasons, if there is more than one?

14 A. I had a scheduled trip that fell through
15 and was unable to make the distance.

16 Q. This scheduled trip, was it for the
17 specific purpose of purchasing this firearm?

18 A. No. I scheduled a family vacation and was
19 going to stop and make the purchase and then make a
20 second trip at a later date, and the trip fell through,
21 and I could not justify making two trips for that
22 firearm.

23 Q. When the trip was planned, it was going to
24 be more than a ten-day stay in the LA area?

25 A. No.

1 Q. So it was less than a ten-day stay?

2 A. Correct.

3 Q. But the plan, the trip plan fell through?

4 A. Didn't work.

5 Q. For this, the AR-15, did you consider
6 having it delivered to you by the mail or some other
7 means that would mean that you didn't have to go
8 physically get the firearm?

9 A. Yes.

10 Q. What, what other methods of delivery did
11 you consider?

12 A. Oh, I'm sorry. I misunderstood the
13 question.

14 Q. Go ahead. What I'm -- let me rephrase.
15 Did you consider a delivery system or -- strike the
16 question.

17 Did you consider obtaining the firearm, the
18 AR-15 through the mail or some other means that would
19 have meant you didn't have to go to LA to get the
20 firearm?

21 A. I considered having it shipped to a local
22 FFL, yes.

23 Q. And obviously, you didn't follow through.
24 What were the reasons that you didn't?

25 A. Same as before, cost preventative.

1 Q. Okay. Do you recall what the asking price
2 for the firearm was?

3 A. Not at all.

4 Q. Can you give me your best guess or your
5 best estimate, rather, your best estimate?

6 A. Maybe \$800.

7 Q. And when we talk about the potential cost
8 of delivery, let's be all inclusive, dealer fees, etc.,
9 what was that amount of money?

10 A. At least \$150.

11 Q. And at the time did you have the \$800 or
12 the amount of money that it would have cost --

13 A. Yes.

14 Q. -- to buy the firearm?

15 A. Yes.

16 Q. But you did not have the extra?

17 A. No.

18 Q. Okay. I say extra, I mean for the
19 delivery.

20 A. I understand.

21 Q. Okay. Let's look back at the Complaint.

22 I think it's Exhibit 4, paragraph 68, please, which is on
23 page 12. Let me ask you to read that paragraph to
24 yourself. You don't need to read it aloud, but just
25 tell me when you finish reading it.

1 as a City-owned property, to hold a rally or have a
2 protest regarding gun rights?

3 A. I don't believe so.

4 Q. You have ever tried to obtain a permit
5 for a protest, even if you were not going to be in the
6 protest?

7 A. Not to my knowledge.

8 Q. Have you ever borrowed a shotgun from
9 anyone?

10 A. Yes.

11 Q. If you -- have you ever -- let's see,
12 when -- how many times have you borrowed a shotgun from
13 somebody?

14 A. Only once that I can think of.

15 Q. Do you understand that if there was a time
16 when you were going through a ten-day waiting period
17 you would be able to go to somebody who you borrowed a
18 shotgun from before and be able to borrow it again?

19 A. I understand that that's a possibility,
20 but not a given.

21 Q. When is the last time you tried to borrow
22 any kind of firearm from anyone, and let's leave out,
23 for example, if you're shooting at, doing target
24 shooting or something? Let's leave out something like
25 that.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

---oOo---

JEFF SILVESTER, MICHAEL POESCHL,)
Brandon COMBS, The CALGUNS)
FOUNDATION, INC., a non-profit)
organization, and The Second)
AMENDMENT FOUNDATION, INC., a)
non-profit organization,)

Plaintiffs,)

vs.)

KAMALA HARRIS, Attorney General)
of California (in her official)
capacity:, and DOES 1 to 20,)

Defendants.)

No. 1:11CV02137AWISKO

DEPOSITION OF
BRANDON COMBS
FRESNO, CALIFORNIA
MAY 10, 2013

ATKINSON-BAKER, INC.
COURT REPORTERS
(800) 288-3376
WWW.DEPO.COM

REPORTED BY: THERESA G. MENDOZA, CSR NO. 12338
FILE NO.: A703C38

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

---oOo---

JEFF SILVESTER, MICHAEL POESCHL,)
Brandon COMBS, The CALGUNS)
FOUNDATION, INC., a non-profit)
organization, and The Second)
AMENDMENT FOUNDATION, INC., a)
non-profit organization,)
Plaintiffs,)
vs.) No. 1:11CV02137AWISKO
KAMALA HARRIS, Attorney General)
of California (in her official)
capacity:, and DOES 1 to 20,)
Defendants.)
-----)

Deposition of BRANDON COMBS, taken on
behalf of Defendants, at 2550 Mariposa Mall, Fresno,
California, commencing at 8:51 a.m., Friday, May 10,
2013 before Theresa G. Mendoza, CSR No. 12338.

A P P E A R A N C E S

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I N D E X

WITNESS: BRANDON COMBS

EXAMINATION	PAGE
BY MR. EISENBERG	5, 208
BY MR. OTTEN	206, 215

EXHIBITS

LETTER	PLAINTIFF'S DESCRIPTION	PAGE
	(NONE)	

NUMBER	DEFENDANTS' DESCRIPTION	PAGE
8 -	Interrogatory Responses	18
9 -	Calgun Web Post	201
10 -	Editorial	205

QUESTIONS WITNESS WAS INSTRUCTED NOT TO ANSWER:

(NONE)

INFORMATION TO BE SUPPLIED:

(NONE)

1 Q. Let me direct your attention to page 29,
2 Interrogatory No. 16. That's at the bottom of the
3 page, and then to the response is on the following
4 page, page 30. If you could read the Interrogatory and
5 the response, and then tell me when you're done.

6 A. Okay.

7 Q. Ready? So you make reference to something
8 called opportunity cost or lost opportunity cost. What
9 do you mean by a lost opportunity cost?

10 A. An opportunity cost in this would be time
11 I could have spent on billable hours doing real work
12 versus going to a gun store for a second trip.

13 Q. Isn't it true that everything that you do
14 in your life where you're not billing time for work is
15 a lost opportunity to bill time for work?

16 A. Perhaps.

17 Q. You detail expenses incurred due to having
18 to make a second trip to a firearms dealer to obtain a
19 firearm that you had purchased like ten days before,
20 and you total up the expense to be approximately \$1500;
21 do you see that reference there on line 10?

22 A. Yes, I do.

23 Q. Is that \$1500 lifetime?

24 A. Yeah. Accumulatively.

25 Q. How did you figure that amount, \$15,000?

1 A. Basically doing mileage to and from
2 different dealers that I know I've gone to. I know
3 what my fuel consumption is for my vehicle. All those
4 sorts of actual direct costs that are measurable.

5 Q. Okay. So it does not include opportunity
6 cost, or it does include opportunity cost?

7 A. Does not.

8 Q. Okay. And then there's a reference to a
9 few lines down, line 14, \$100 in resubmission fees. Is
10 that \$100 a lifetime total of the resubmission fees
11 that you've had to pay?

12 A. Yes.

13 Q. How did you calculate that figure?

14 A. Those were just instances off the top of
15 my head that I remembered where, I had to resubmit a
16 DROS because I couldn't get the firearm -- let me pause.
17 Because I couldn't take the firearm with me on the day
18 it was purchased.

19 Q. Did you consult any written records to
20 come up with the \$100 figure?

21 A. No, not for that.

22 Q. I'll ask the same question about the
23 \$1500, did you consult any records to come up with that
24 figure?

25 A. No.

DECLARATION OF SERVICE

Court: **U.S. District Court, Eastern District of California**
Case Name: ***Silvester v. Harris***
Case No.: **1:11-cv-02137-AWI-SKO**

I declare:

I am 18 years of age or older and not a party to this matter. I am employed in Los Angeles, California, in the Office of the Attorney General, Department of Justice, State of California (“OACG”), which is the office of a member of the California State Bar, at which member’s direction the following service is made.

I certify my understanding that all the participants in the above-entitled case are registered CM/ECF users.

I hereby certify that, on September 25, 2013, I, assisting Jonathan M. Eisenberg, caused to be electronically filed with the U.S. District Court, Central District of California, Clerk of the Court, through the CM/ECF system, the document with the following titles: [1] **NOTICE OF MOTION AND MOTION OF DEFENDANT CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS FOR SUMMARY JUDGMENT (FED. R. CIV. P. 56)**; [2] **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS’S MOTION FOR SUMMARY JUDGMENT (FED. R. CIV. P. 56) – INCLUDING STATEMENT OF UNDISPUTED MATERIAL FACTS**; and [3] **DECLARATION OF JONATHAN M. EISENBERG IN SUPPORT OF DEFENDANT CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS’S MOTION FOR SUMMARY JUDGMENT (FED. R. CIV. P. 56) – INCLUDING STATEMENT OF UNDISPUTED MATERIAL FACTS**

By pre-arrangement with opposing counsel, I also e-mailed the same papers to the following e-mail address: vic@ottenandjoyce.com and megan@ottenandjoyce.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 25, 2013, at Los Angeles, California.

Reina V. Velasco

Declarant

Signature