14-16840

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellees,

v.

KAMALA HARRIS, Attorney General of California (in her official capacity),

Defendant and Appellant.

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

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

URGENT MOTION TO STAY ENFORCEMENT OF JUDGMENT (FED. R. APP. P. 8(A); 9TH CIR. R. 27-3(B))

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RELIEF SOUGHT: EXPEDITED STAY OF FINAL JUDGMENT

Appellant Kamala D. Harris, Attorney General of California, moves this Court for an order staying the District Court's August 25, 2014, final judgment granting injunctive relief in the present case, while the appeal of the judgment is pursued. Fed. R. App. P. 8(a). Appellant brings this motion as an urgent motion under Ninth Circuit Rule 27-3(b), because the requested relief must be considered and granted in advance of the February 23, 2015, deadline to comply with the injunctive relief provisions of the judgment, a deadline that will be reached before the present appeal is resolved.

Unless the District Court's judgment is stayed by this Court, Appellant will have to implement complex, costly changes to the partly computerized, partly manual process for approving all firearm purchases throughout California, and a duly enacted California state law aimed at protecting public safety will be partly enjoined.

BACKGROUND

I. PRIOR PROCEEDINGS SEEKING STAY OF JUDGMENT

On September 29, 2014, Appellant moved the District Court for a stay of its final judgment pending the outcome of the present appeal. On November 20,

2014, the District Court denied that motion.[1] On November 26, 2014, Appellant notified four opposing attorneys herein that Appellant would bring the present motion. Since then, two of the opposing attorneys, in separate telephone calls, have acknowledged receiving the notice.[2]

II. HISTORY OF LITIGATION

This case presents a federal constitutional challenge, under the Second Amendment and also the Fourteenth Amendment, to enforcement of California's statutory "waiting-period" laws for firearm acquisitions, California Penal Code sections 26850 and 27540 (the "Waiting-Period Laws"). Under these laws, any person who does not qualify for one of the statutory exemptions and wishes to purchase a firearm legally in California must wait 10 days between submitting a "Dealer Record of Sale" ("DROS") application to California's Bureau of Firearms ("BOF") for approval to purchase the firearm, and, after being so approved, taking delivery of the firearm.

The plaintiffs-appellees herein include Jeff Silvester ("Silvester") and Brandon Combs ("Combs"), two California residents who, at all relevant times, (1)

[1] Appellant also had unsuccessfully (but without prejudice) moved the District Court to extend by 180 days the deadline for Appellant to comply with the judgment.

[2] Appellant makes these statements to comply with Federal Rules of Appellate Procedure 8(a)(1)(A) and 8(a)(2)(A)(ii) and Ninth Circuit Rule 27-3(b)(1).

owned multiple firearms each; (2) had been through waiting periods before in connection with at least one past firearm transaction; but (3) objected to having to go through waiting periods again for subsequent firearm transactions. *Silvester v. Harris*, ___ F. Supp. 2d ___, ___, 2014 WL 4209563 at *10 (E.D. Cal. Aug. 25, 2014). The other two plaintiffs-appellees are firearm-rights organizations, The Calguns Foundation, Inc., and The Second Amendment Foundation, Inc.

After a March 2014 bench trial and subsequent written submissions and closing argument in the summer of 2014, the District Court held that the Waiting-Period Laws violate the Second Amendment as applied to any prospective firearm purchaser who (1) passes California's background check in less than 10 days and (2) fits into at least one of three categories, by: (a) having a firearm recorded in that person's name in California's Automated Firearms System ("AFS") or (b) having a valid, current Carry Concealed Weapon ("CCW") license or (c) having both a firearm recorded in that person's name in AFS and a valid, current Certificate of Eligibility. *Silvester*, 2014 WL 4209563 at *36. Accordingly, the District Court ordered that BOF must authorize release of a purchased firearm to any such person as soon as he or she passes a background check, whether or not 10 days have passed. *Id.* The District Court stayed this ruling for 180 days, making compliance due by February 23, 2015. *Id.* at *37.

LEGAL STANDARDS FOR STAYS

In deciding whether to grant a request for a stay, the Court employs a balancing test that considers the following four factors:

1. Whether the stay appellant is *likely to succeed on the merits*;
2. Whether the stay applicant has shown *likely irreparable injury* absent the stay;
3. Whether issuance of the stay will *substantially injure the other parties* interested in the proceedings (affecting whether the *balance of equities* tips in favor of the stay applicant); and
4. The *public interest*.

Latta v. Otter, 771 F.3d 496, 498 (9th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *accord Leiva-Perez v. Holder*, 640 F.3d 962, 964-70 (9th Cir. 2011); *Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) ("A party seeking a stay must establish that he [she, or it] is likely to succeed on the merits, that he [she, or it] is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in his [her, or its] favor, and that a stay is in the public interest.").

ARGUMENT: ALL FOUR STAY FACTORS FAVOR A STAY HERE

The District Court's injunction should be stayed because, as shown below, Appellant meets all four requirements for stay relief.

I. APPELLANT IS LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL

Regarding the first prong of stay analysis: Appellant meets the likelihood-of-success requirement in two ways. First, the District Court's judgment resolved important questions of first impression involving Second Amendment law, which circumstance by itself satisfies the likelihood-of-success prong. Second, Appellant has a likelihood of succeeding on the merits of the appeal, and has raised serious legal questions on the merits.

A. The Novelty of the Present Case Alone Is Enough to Satisfy the Likelihood-of-Success Prong

For purposes of the likelihood-of-success prong of stay analysis, "questions of first impression on which no binding precedent exists" can, on their own, satisfy "the requirement that a movant is likely to succeed on the merits," even where the trial court has come to a conclusion contrary to that advocated by the party seeking a stay. *Hunt v. Check Recovery Sys., Inc.*, 2008 WL 2468473, at *3 (N.D. Cal. 2008) (citing *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987)); *cf. Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (noting that trial court in *Pearce* granted appellant's stay motion in part because appellant's claim raised issues of first impression).

The case at bar apparently is the first Second Amendment challenge to any of the firearm-acquisition waiting-period laws in effect in approximately ten U.S. states. *Silvester*, 2014 WL 4209563 at *28. The underlying issue of what sort of

waiting period a U.S. state may impose on the acquisition of a firearm is of obvious nationwide importance, and most suitable for careful appellate-court consideration. The District Court's groundbreaking ruling should be stayed while appellate review occurs. *Cf. Salix v. U.S. Forest Serv.*, 995 F. Supp. 2d 1148, 1154 (D. Mont. 2014) (holding that lack of controlling appellate-court precedent, because of split of decisions among appellate courts, indicates that appellant has likelihood of success on merits, for stay purposes).

B. Appellant Is Likely to Succeed in Defending the Waiting-Period Laws on Appeal

This Court has explained that there are "many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect' . . . a 'substantial case on the merits,' . . . or . . . that 'serious legal questions are raised.'" *Leiva-Perez*, 640 F.3d at 967-68 (citations omitted). As shown below, Appellant meets any valid formulation of the standard.

The likelihood-of-success analysis here must be grounded in the Ninth Circuit's two-step analysis for Second Amendment cases, prescribed by *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). "The two-step inquiry we have adopted (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citation and internal punctuation omitted). Notably, *Chovan* underscores

that "this two-step inquiry reflects the Supreme Court's holding . . . that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited." 735 F.3d at 1133 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

1. The Waiting-Period Laws Fall Outside the Historically Understood Scope of the Second Amendment

The Waiting-Period Laws do not impose a constitutionally cognizable burden on the core Second Amendment right to have a firearm for self-defense. Silvester and Combs each has acquired multiple personal firearms in California while the Waiting-Period Laws have been in effect (*Silvester*, 2014 WL 4209563 at *10), and, presumably, could have legally acquired many more firearms, as well. And there would be at most a *de minimis* Second Amendment burden on Silvester or Combs in having to endure a short waiting period to be able to obtain an additional firearm, including by having to make not one trip but two trips to the firearm dealer to obtain the gun. *Cf. Kwong v. Bloomberg*, 723 F.3d 160, 166-67 (2d Cir. 2013) (rejecting Second Amendment challenge to $340 handgun license fees in part because plaintiffs were able to pay fees, obtain licenses). The District Court, in finding a Second Amendment burden, ascribed too much weight to the burden on Appellees, and that determination warrants reversal.

Relatedly, the Waiting-Period Laws fall within at least two categories of longstanding firearms regulatory measures—(1) laws imposing conditions and

qualifications on the commercial sale of arms, and (2) prohibitions on the possession of firearms by felons and the mentally ill—that the U.S. Supreme Court, in *Heller*, 554 U.S. at 625-27, specifically said should not be subject to "doubt." *See also United States v. Vongxay*, 594 F.3d 1111, 1115, 1117 (9th Cir. 2009) (holding that *Heller*'s list identifies laws that do not implicate the Second Amendment). Indeed, the Waiting-Period Laws impose conditions, 10-day delays, on the commercial (and other) sale of firearms and thus are one of *Heller*'s presumptively lawful "commercial-conditions" laws. Also, the Waiting-Period Laws, by affording time for background checks on prospective firearms purchasers (as the District Court order still allows), facilitate the prohibitions on the possession of firearms by felons and the mentally ill, of which prohibitions, as noted above, *Heller* expressly approves. The Waiting-Period Laws thus fit into two categories of firearms laws that the U.S. Supreme Court, in *Heller*, has declared presumptively lawful.

The District Court erred by refusing to group the Waiting-Period Laws among *Heller*'s non-exhaustive list of presumptively lawful measures.

2. The Waiting-Period Laws Do Not Warrant Constitutional Scrutiny but Would Survive it

As to the second step of the Second Amendment analysis, if reached, this Court should find that Waiting-Period Laws—contrary to the District Court's judgment—survive heightened scrutiny.

a. A Lenient Form of Heightened Scrutiny, if Any, Would Be Appropriate

Assuming *arguendo* that the Court were to find that the Waiting-Period Laws burden the Second Amendment, the Court:

> must then proceed to the second step of the Second Amendment inquiry to determine the appropriate level of scrutiny. When ascertaining the appropriate level of scrutiny, we consider (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on that right.

Jackson, 746 F.3d at 960-61 (quoting *Chovan*, 735 F.3d at 1136, 1138).

> A law that imposes such a severe restriction on the core right of self-defense that it amounts to a *destruction* of the Second Amendment right is unconstitutional under any level of scrutiny. By contrast, if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny.

Jackson, 746 F.3d at 961 (quoting *Heller*, 554 U.S. at 629) (emphasis in original).

The California Legislature's enactment and the Attorney General's enforcement of the Waiting-Period Laws do not destroy the Second Amendment right. As noted above, Silvester and Combs have had multiple firearms each at all relevant times in the present litigation. Nor do the Waiting-Period Laws implicate the core of the Second Amendment right, much less burden it severely. The core of the Second Amendment right, despite being a subject of considerable debate, has never been interpreted as being a right to obtain a firearm (including a second or subsequent firearm) immediately. *Cf. Heller*, 554 U.S. at 595, 626 ("the right

was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Neither a 10-day waiting period nor the need to take two trips to a firearm store before a person—especially one who already has a gun—can legally obtain a gun amounts to a substantial burden on the Second Amendment right. Indeed, the Fifth Circuit has held that Texas statutes prohibiting people under 21 years old from carrying concealed handguns in public do not impose substantial burdens on the Second Amendment right of such people, because the restriction of up to several *years* of time is still *temporary*, ending when each person turns 21 years old. *See National Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013). Moreover, the Waiting-Period Laws' statutory exemptions—e.g., for dealer-to-dealer transfers in advance of sales to consumers (Cal. Penal Code § 27125)—lighten any burden even more. *See Chovan*, 735 F.3d at 1138 (holding that exceptions to lifetime federal ban on firearm prohibition by domestic violence misdemeanants lighten Second Amendment burden of ban).

It follows that the Court should apply some form of intermediate scrutiny, as opposed to strict scrutiny, to the Waiting-Period Laws.

b. The Waiting-Period Laws Survive Intermediate Scrutiny

"Although courts have used various terminology to describe the intermediate scrutiny standard, all forms of the standard require (1) the government's stated

objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. Notably, the fit between the regulation and the harm being addressed need be only reasonable, not perfect. *United States v. Carter*, 750 F.3d 462, 464 (4th Cir. 2014); *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010). The Court must determine the importance of California's objective for the Waiting-Period Laws, and the fit between those laws and the objective. The outcome of the analysis should have been complete vindication of the Waiting-Period Laws.

(1) The Waiting-Period Laws Address the Important Government Interest in Enhancing Public Safety and Minimizing Gun Violence

It is self-evident—and not disputed here—that the Waiting-Period Laws have an important objective of keeping firearms away from people likely to misuse them, and minimizing firearm violence generally. *See Chovan*, 735 F.3d at 1139 (recognizing significance of governmental objective of keeping guns away from dangerous people). The legislative history of the Waiting-Period Laws confirms that the California Legislature had in mind reducing firearm violence, by providing BOF with the time needed to complete background checks on prospective firearms purchasers, and by creating cooling-off periods for people who might have violent

impulses and access to new firearms. *People v. Bickston*, 91 Cal. App. 3d Supp. 29, 31-32, 154 Cal. Rptr. 409 (1979).[3]

(2) The Waiting-Period Laws Reasonably Fit the Public Safety Objective

(a) **Appellant Has Established the Sufficiency of the Fit**

With no dispute over the importance of the State's objectives with the Waiting-Period Laws, the focus of the analysis thus becomes the fit between the Waiting-Period Laws and the public-safety objective. The evidence adduced at trial establishes the reasonableness of that fit. BOF processes about a million DROS applications and thus a million background checks annually. *Silvester*, 2014 WL 4209563 at *18. The processing involves automated searching of multiple state and federal databases for evidence of events or incidents that would disqualify people from having firearms. *Id.* at *12-*16. The vast majority of applications also require manual review by analysts to confirm (1) identity matches between prospective gun purchasers and purported background information about them in the different databases, and (2) the accuracy and completeness of the database records of potential "prohibiting events" precluding firearm acquisition, among other things. *Id.* at *18-*19. That work can regularly take many days. *Id.*

[3] Background checks sometimes include investigations and interruptions of "straw" purchases, work that can be particularly time-consuming. *Silvester*, 2014 WL 420953 at *22.

at *19. Hence the 10-day waiting period is well-justified for helping to assure that public safety is protected in connection with processing each DROS application, even for people who may once have qualified to and did lawfully obtain firearms, but may have since become "prohibited persons." Furthermore, Appellant submitted medical studies that revealed some ameliorative effects of waiting-period laws in reducing the commission of violent acts, particularly suicides, with firearms. *Silvester*, 2014 WL 4209563 at *20-*21. In sum, the Waiting-Period Laws effectuate the important government interest in public safety by allowing adequate time for background checks to be conducted on all prospective firearms purchasers, for all transactions, and to give all firearms purchasers time to cool off before taking possession of the firearms.

(b) The District Court Incorrectly Found an Insufficient Fit

Reaching the opposite conclusion, the District Court—misstating a holding of *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012) ("*Carter I*")—discounted all the above-described evidence and reasoning as non-probative "anecdote and supposition" (*Silvester*, 2014 WL 4029563 at *27, construing *Carter I*), especially with respect to people who have previously lawfully purchased firearms, or have firearm-use permits, and seek additional firearms. *See, e.g.*, *Silvester*, 2014 WL 4209563 at *31. While *Carter I* does reject relying on

only anecdote and supposition, the decision proceeds beyond the excerpt quoted by the District Court and actually endorses reliance on a mixture of kinds of evidence:

> [W]hile the government must carry its burden to establish the fit between a regulation and a governmental interest, it may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require.

Carter I, 669 F.3d at 418 (citation omitted). Going against the more nuanced teaching of the *Carter I* decision, the District Court would not credit Appellant's presentation of a mix of legislative text and history, empirical evidence, case law, and common sense. At the same time, the District Court relied on its own supposition that people with CCW licenses tend to be less impulsively violent than other people, and so need not go through 10-day firearm-acquisition waiting periods aimed at maintaining public safety: "The nature and unique requirements of CCW licenses are such that it is unlikely that CCW license holders would engage in impulsive acts of violence." *Id.* at *33. On these thin grounds, the District Court erroneously concluded that the Waiting-Period Laws do not sufficiently fit with the public-safety objective. *Id.* at *34.

II. THE STATE OF CALIFORNIA WILL BE IRREPARABLY INJURED ABSENT A STAY

A. The Enjoining of a Duly Enacted State Law, as Would Happen Here, Irreparably Injures the State

As for the second prong of stay analysis, absent a stay, the State of California (the "State") will be irreparably injured as a matter of law. "It is clear

that a state suffers irreparable injury whenever an enactment of its people or representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *but see Independent Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (characterizing that statement in *Coalition* as dicta, and explaining that while "a state may suffer an abstract form of harm whenever one of its acts is enjoined . . . [t]o the extent that is true . . . it is not dispositive of the balance of the harms analysis"), *vacated by Douglas v. Independent Living Ctr. of So. Cal., Inc.*, ___ U.S. ___, ___, 132 S.Ct. 1204, 1207 (2012), *but cited by Latta*, 771 F.3d at 500. Because the District Court has partly enjoined enforcement of the Waiting-Period Laws, the State (represented here by Appellant) has suffered an irreparable injury for purposes of stay analysis.

In a related respect, the State is being irreparably injured because the Court is overriding the California Legislature's considered judgment—based on decades of oversight of firearm trends and experiments with different waiting-period lengths—that a 10-day waiting period for firearm transactions best maintains public safety. *Silvester*, 2014 WL 420956 at *11-*12.

B. The State Will Suffer Concrete, Irremediable Harms in the Absence of a Stay

Separately and independently, a party subject to an injunction faces irreparable injury if the injunction requires the party to expend significant time and resources that the party will not be able to recoup even if the party's position is ultimately vindicated on appeal. *Project Vote/Voting for America, Inc. v. Long*,

275 F.R.D. 473, 474 (E.D. Va. 2011); *cf. Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (considering irreparable injury in context of application for preliminary injunctive relief; holding that unrecoverable expenditures of money, time, and other resources may constitute irreparable injury) (citations omitted).

Here, the District Court granted Appellant six months to comply with the injunction, recognizing that substantial time and effort would be required for compliance, because of the need to reprogram (yet to keep functional) complex computer systems linked to massive databases that process upwards of one hundred thousand firearm transactions per month. *Silvester*, 2014 WL 4209563 at *18. Since then, BOF has taken the steps that could be taken before actually making significant changes to the computer systems or expending large amounts of money not yet available, as detailed in the declarations of BOF Chief Stephen J. Lindley and Marc St. Pierre, a BOF information technology director, submitted originally to the District Court and resubmitted here. Chief Lindley's declaration shows that full compliance with the injunction, while perhaps simple-seeming at a glance, will require BOF (1) to hire and to train a significant number of new employees to do extra processing of all DROS applications for three new categories of information (whether the processing is manual or computer-aided), and (2) (a) to reassign in-house IT experts working on other critical projects to or

(b) to hire and to orient an outside vendor to modify the relevant computer systems (Decl. of Stephen J. Lindley in Supp. of Mtn. to Amend Judgment, submitted herewith, ¶¶11-16)—two expensive and time-consuming propositions. Most significantly, if this Court overturns the injunction, these expensive and disruptive measures will prove to have been unnecessary, and there is no realistic prospect that the State will be able to recover, from Appellees or otherwise, any compensation for the efforts that the State was forced to undertake. There will be still more unrecoverable costs in undoing the changes, if the judgment is overturned on appeal.

In conclusion, in these two ways, Appellant has demonstrated the irreparable injury that will arise in the absence of a stay.

III. THE INJURY TO APPELLEES AND THE BALANCE OF HARMS FAVOR A STAY

Turning to the third prong of stay analysis, injury to the non-moving parties, Appellees should not be allowed to rely on just abstract injuries, and must be able to point to concrete injury to themselves. *Cf. Latta*, 771 F.3d at 500 (focusing on not only abstract/legal but also financial, social and psychic harms to litigants opposing stay). But nothing about the operation of the Waiting-Period Laws precludes qualified firearm purchasers from acquiring more firearms—albeit with slight delays in the transactions—during the pendency of an appeal here. Nor would immediate implementation of the District Court's order ensure that

Appellees or other people could acquire firearms without making second trips to firearm dealers, which second trips are perhaps the primary practical harm identified by the District Court in its decision. *Silvester*, 2014 WL 4209563 at *10. The trial court's remedial order still allows for all prospective firearm purchasers to go through background checks (*Silvester*, 2014 WL 4209563 at *36 n.42), which usually are not completed for at least several days. *Id.* at *20. Because only a small fraction of DROS firearm-purchase applicants are quickly "auto-approved" (*id.* at *19), most DROS applicants probably would still have to take two trips to a dealer to acquire a new firearm.

Furthermore, the balance of harms favors the State's position. Appellant has above laid out, on one side of the scale, the various irreparable harms to the State in the absence of a stay. A duly enacted state public-safety law will be partly enjoined. BOF will have to take expensive and disruptive measures to modify complex systems handling hundreds of thousands of firearm transactions each month, without possibility of later recovery of those expenditures. On the other side of the scale, a stay will push back the time period when Silvester, Combs, and other prospective firearm purchasers who already have firearms, if victorious on appeal, may have to go through firearm-acquisition waiting periods that are shorter than at present. Yet, because the District Court would require, even in the new regulatory regime, release of a firearm to its purchaser only after a background

check is passed, and that usually takes several days at least, any benefit to Appellees is incremental. As a practical matter any burden imposed on firearm purchasers by a stay here is modest in comparison to the burden that will be imposed on the State if BOF is required to implement the District Court's remedial order during the pendency of the present appeal.

IV. THE PUBLIC INTEREST IS BEST SERVED BY STAYING THE INJUNCTION

Regarding the fourth prong of stay analysis: The public interest favors granting a stay. In addition to avoiding what may turn out to be unnecessary expenditure of time and money by the State, a stay will preserve the status quo involving important public-safety laws, which no court has declared facially invalid, while this novel matter is considered by the present Court.

Appellant has justified the Waiting-Period Laws, even as applied to people who already have firearms, as public-safety measures. This Court may ultimately validate that legislative choice. While that outcome remains a possibility, the public interest favors staying the District Court's injunction.

Another important consideration is that in the context of an injunction the status quo is defined as the state of affairs *before* the court entered the injunction. *See Nken*, 556 U.S. at 429 (describing the status quo as "the state of affairs before the removal order was entered"). The District Court's order here alters the status

quo for a system that processes nearly one million firearm-acquisition applications per year. *Silvester*, 2014 WL 4209563 at *18. The status quo should be preserved.

CONCLUSION

Given the significant issues raised by the present appeal and the unrecoverable efforts that Appellant faces in complying with the District Court judgment, this Court should stay enforcement of the judgment pending the outcome of the appeal. Because the judgment calls for complete compliance by February 23, 2015, Appellant further requests that the Court consider this matter urgent and impose the stay significantly before that date.

Dated: December 9, 2014

Respectfully submitted,

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EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

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

DECLARATION OF STEPHEN J. LINDLEY

I, Stephen J. Lindley, declare:

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

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

3. I have been employed with DOJ since 2001, and have held my current position since 2009.

4. I have reviewed the Court's August 25, 2014, Order and understand its requirements. I have discussed the requirements with members of my staff and have come to an initial determination of the changes that BOF must make to implement the Court's Order.

5. To comply with the Court's Order, BOF has two options. Either BOF will need to have its analysts manually evaluate whether each of the firearm-purchase (DROS) applicants meets the criteria in the Order for immediate release of the firearm(s) after passing the background check, or alternatively, it will need to change certain of its computer systems so that relevant data from the CCW database, the COE database, and the Automated Firearm System (AFS) are automatically queried and returned as part of the Basic Firearms Eligibility Check (BFEC).

6. The manual approach requires at least 12 months to implement.

7. Under the manual approach, BOF analysts would manually query the CCW database, the COE database, and AFS, as part of the background check. However, this would require a significant increase to the number of analysts BOF has on staff for two reasons.

8. First, BOF analysts would need to manually query these databases for all DROS applications, and not just those that were *not* auto-approved. A DROS applicant could no longer be auto-approved under this approach, because a determination must first be made as to whether each applicant meets the criteria in the Order. This means that analysts' workload would be instantly increased because the analysts would have to review applications that were previously

auto-approved. (In the first eight months of 2014, BOF analysts reviewed approximately 85 percent of all DROS applications while the remainder were auto-approved.)

9. Second, for BOF analysts to manually query the CCW database, the COE database, and AFS, the analysts must access a separate system interface and perform the queries separately against the different databases. This increases the amount of time that analysts must spend reviewing each application.

10. BOF processed 960,179 DROS applications in 2013. BOF anticipates processing a similar number of DROS applications this year. Any increase in the time that it takes the analysts to review each application is amplified by the large number of DROS applications that BOF processes.

11. For these two reasons, if BOF analysts are required to manually query the CCW database, the COE database, and AFS to comply with the Court's Order, BOF will need a significant increase in the number of analysts it currently has on staff.

12. BOF's existing analysts on staff are already working in excess of 40 hours a week. BOF presently mandates the analysts to work at least 10 hours of overtime each week to keep up with the processing of DROS applications.

13. To hire additional BOF analysts to meet the anticipated increase in workload under the manual approach, BOF would require a significant increase in funding, which must come from the California Legislature. Assuming that BOF is able to obtain the necessary funding from the Legislature, it would then take at least six to eight months to hire and train the analysts before the new analysts may process applications independently. For these reasons, it would take more than 180 days and most likely at least 12 months to get sufficient numbers of analysts to manually implement the Court Order.

14. The second approach is to change DOJ's computers systems so that relevant data from the CCW database, the COE database, and AFS are automatically queried as part of the BFEC for each DROS applicant. Then, after completion of the background check, and if the

DROS applicant meets the criteria in the Order, DOJ could inform the firearm dealer that the firearm(s) may be released to the DROS applicant.

15. This is BOF's preferred approach since, once implemented, it will likely require fewer human resources and would be more efficient. This approach, however, will also most likely take at least 12 months to implement. DOJ's internal IT staff with the proper skills and training to work on these systems and databases are presently assigned to other critical projects, many associated with deadlines set by statutes. DOJ risks missing certain of the deadlines if these IT staff members are required to be pulled off of those projects in order to change BOF's applications and databases within 180 days. Based on my preliminary analysis, and the fact that staff with the necessary skills is presently assigned to other critical BOF projects, I believe that BOF will have to contract with outside vendors to work with DOJ staff to implement the changes to the various systems and databases described in the paragraphs to implement the changes ordered by the Court.

16. Furthermore, even under this approach, additional BOF analysts are likely required since the analysts may need to review certain extra records, such as records where a positive identity match could not be made or records that show unclear results. Therefore, the above-described delay issues related to BOF's budget and hiring and training new analysts would still come into play.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22 day of September, 2014, at Sacramento, California.

Stephen J. Lindley

EXHIBIT 2

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

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

DECLARATION OF MARC ST. PIERRE

I, Marc St. Pierre, declare:

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

2. I am a Data Processing Manager II with the California Department of Justice (DOJ). I manage the Information Technology (IT) application development team responsible for supporting numerous applications for the Bureau of Firearms (BOF), including the Automated Firearms System (AFS), Carry Concealed Weapons (CCW), California Firearms Information Gateway (CFIG), Certificate of Eligibility (COE), Consolidated Firearms Information System (CFIS), Dealer Record of Sale (DROS) System, and the DROS Entry System (DES).

3. I have been with the Department of Justice since 1998. I have held my current position since July 1, 2013.

4. I am familiar with the various BOF applications and databases that my team supports as part of the DROS background check process.

5. Presently, the CCW database and COE database are not queried as part of the Basic Firearms Eligibility Check (BFEC). Also, AFS is not queried as part of the BFEC to determine whether a DROS applicant in the AFS has a firearm.

6. Presently, AFS is queried as part of the BFEC only to determine whether the firearm identified in the DROS application by its serial number has been reported lost or stolen.

7. Conceptually, it may be simple to alter the DROS background check process to check whether a DROS applicant has an active CCW license or an active COE, or the applicant has a firearm in AFS. Technologically, however, it is a complex process that will require highly-skilled resources to make the changes to the various IT systems and processes involved in the DROS background check process.

8. In my preliminary analysis, I believe that, to implement the Court's Order such that queries to CCW, COE, and AFS are automated as part of the BFEC, changes must be made at least to the DROS, DES, and CFIS. I am currently investigating and analyzing the changes that

may be needed to be made to each of these systems. Further analysis may show that it will be necessary to modify other systems, including but not limited to CFIG, COE, CCW, and AFS.

9. I have been involved with BOF's procurement of outside vendors to make technical changes to DOJ's computer systems and am familiar with the general process and the time required.

10. The first step in the procurement process is to prepare a Statement of Work (SOW) and a Request for Proposal (RFP). To prepare these documents, BOF will first need to develop an initial set of business requirements (or business rules) for the changes that need to be made to the computer systems.

11. This involves a preliminary determination as to which of BOF's computer systems and databases may need to be changed, and what changes may need to be made to each of the impacted systems and databases. As discussed above in paragraph 8, I have made a preliminary determination as to which systems may be impacted and am in the process of determining the changes that will likely need to be made to each of those systems.

12. Once BOF determines the preliminary set of business requirements, DOJ will prepare the SOW and the RFP, and release them to the vendors.

13. The vendors may then ask DOJ questions about various aspects of the SOW and RFP. BOF will publish the answers to those questions to all vendors, who may then ask additional or follow up questions. There may be multiple rounds of questions and answers.

14. After all vendor questions have been answered, the vendors would submit their bids and responses for the project. DOJ would then review these responses and bids, including checking the vendors' references.

15. DOJ would then select a vendor for the project, negotiate a contract with the vendor, and then submit the contract for approval through the Department's contract and procurement section. After the contract is approved, DOJ then conducts fingerprint clearance checks on the selected vendor's proposed personnel to work on the project. Once the fingerprint clearances are received the vendor may begin work on the project. DOJ must provide the vendor personnel with

adequate on-site workspaces, with all the necessary equipment and software required to complete the scope of work.

16. I estimate that the procurement process I describe in paragraphs 10-15 above will take approximately six months.

17. I base my estimate based on my involvement in BOF's recent procurement of contracts with an outside vendor to make changes to BOF's computers systems, which took approximately six months, from developing the preliminary business requirements to when the vendor actually began work on the project.

18. After procuring the vendor, it will most likely take the vendor, working closely with DOJ staff, at least six months to develop detailed business requirements, write the code, test the code, and then ultimately implement the code. It typically takes this amount of time to make technical changes to BOF's computer systems because it is an iterative process to write and test the code and further modify the business requirements as necessary. During the process of writing and testing code, the initially-determined business requirements typically need to be modified because of issues that became apparent or arise during the writing and testing of the code. After the business requirements are then modified, new code would have to be written and tested, which may then lead to the need for further modification of the business requirements. This process repeats until the final code is successfully tested and implemented, and which business requirements meet BOF's objectives.

19. In sum, based on my past experiences with DOJ, my preliminary estimate is that it will most likely take at least 12 months to procure a vendor and make the necessary technical changes to BOF's computer systems and databases to implement the changes ordered by the Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22 day of September, 2014, at Sacramento, California.

Marc St. Pierre

9th Circuit Case Number(s) 14-16840

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CERTIFICATE OF SERVICE
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) December 9, 2014 .

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Signature (use "s/" format) s/Jonathan M. Eisenberg

****

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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Signature (use "s/" format)