Case No. 20-55437

In the United States Court of Appeals
for the Ninth Circuit

KIM RHODE, et al.
Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
(18-cv-00802-BEN-JLB)

APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL; MOTION TO VACATE ADMINISTRATIVE STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellee the California Rifle & Pistol Association, Inc., certifies that it is a nonprofit organization and thus has no parent corporation and no stock; Appellee Able's Sporting, Inc. certifies that no parent company or publicly held corporation owns more than ten percent of its stock; Appellee R & S Firearms, Inc. certifies that its parent company AIMS, Inc. owns at least ten percent of its stock; and Appellee AMDEP Holdings, LLC certifies that it is not a corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

On April 23, 2020, the district court preliminarily enjoined enforcement of California Penal Code sections 30312(a)-(b), 30314(a), 30352, and 30370(a)-(d), and the criminal enforcement of California Penal Code sections 30365, 30312(d), and 30314(c) (the "Challenged Provisions"), as violative of the Second Amendment or the Commerce Clause of the United States Constitution. Basically, those provisions require anyone seeking to purchase ammunition to do so in-person through a licensed ammunition vendor located in California and pass a background check before taking receipt. Failure to comply is subject to criminal prosecution.

The next day, Defendant California Attorney General Xavier Becerra ("the State") filed an ex parte application requesting that the district court stay its preliminary injunction order while the parties litigate the State's anticipated appeal. The district court denied the State's request. The State has now filed an emergency request for a stay of the preliminary injunction with this Court.

This Court may stay an injunction pending appeal where the moving party establishes that the factors typically applied to the issuance of a preliminary injunction motion warrant a stay. The State has failed to meet its burden to establish that such extraordinary relief is warranted here. It has not—and cannot—establish that it will suffer any real harm absent a stay. The Challenged Provisions are objectively offensive, making Plaintiffs-Appellees ("Plaintiffs") likely to succeed on the merits of their claims. And the impact on the State caused by *temporarily* enjoining them is de

minimis. On the other hand, a stay will cause Plaintiffs and millions of California residents to endure continued violations of their constitutional rights.

The State's motion should be denied. Should this Court deny the State's emergency stay request, Plaintiffs move this Court, under 9th Cir. R. 27-1, to vacate the administrative stay it currently has in place on the preliminary injunction. Order, ECF No. 4, Apr. 24, 2020.

LEGAL STANDARD

Federal Rules of Appellate Procedure Rule 8 allows this Court to suspend, modify, restore, or grant an injunction while an appeal in pending. Fed. R. App. P. 8(a). "A stay is not a matter of right, even if irreparable injury might otherwise result," rather, a stay is "an exercise of judicial discretion" and the "propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. This standard holds regardless of how the applicant styles the stay application. *See Benham v. Namba* (*In re Maria Vista Estates*), No. LA CV 13-cv-05286, 2014 U.S. Dist. LEXIS 188139 (C.D. Cal. Sept. 30, 2014) (discussing the denial of a both a request for a stay pending appeal and administrative appeal).

In determining whether to issue a stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a

stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434. The first two factors "are the most critical." *Id.* As for the first factor, this Court has characterized a "strong showing" in various ways, including "reasonable probability," "fair prospect," "substantial case on the merits," and "serious legal questions . . . raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). When an applicant relies on "serious legal questions," as the State has done here, it must establish irreparable harm and that the balance of harms tips *sharply* in his favor. *See id.* at 966; *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988).

ARGUMENT

I. THE STATE HAS NOT SHOWN A STRONG LIKELIHOOD OF SUCCESS

The State cannot establish that it is likely to succeed in its attempt to overturn the district court's order granting Plaintiffs' Motion for Preliminary Injunction. Simply put, the district court correctly concluded that the Challenged Provisions are likely unconstitutional. It certainly did not abuse its discretion, which is the standard for this Court when evaluating a preliminary injunction, in applying the applicable rules of law to the factual findings that were based on extensive briefing from both parties and multiple hearings, which the court spent months considering. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011).

Plaintiffs will not rehash all of their arguments for why the Challenged Provisions fail constitutional scrutiny here. With its 120-page opinion and its

subsequent order denying the State's motion for an emergency stay, the district court sufficiently acquits itself in justifying its ruling to issue a preliminary injunction. Emergency Mot. Under C.R. 27-3 Stay Prelim. Inj. Pending App. ("Emergency Mot.") Exs. 10, 12. Plaintiffs, however, highlight a few features of the Challenged Provisions that may go unnoticed due to the enormity of the record below. These features help objectively show the Challenged Provisions' patent unconstitutionality.

A. The State's Background Check System Violates the Second Amendment

As the district court explained, "[the State] has conceded that the right to purchase and acquire ammunition is a right protected by the Second Amendment." Emergency Mot. Ex. 12 at 1. Of course, the State must make that concession. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (holding that "the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them"). Thus, the only constitutional question to be decided is whether the burdens the Challenged Provisions place on the exercise of that right meet constitutional scrutiny. They do not.

To be clear, this preliminary injunction does not raise the question of whether ammunition background check systems are unconstitutional per se. Rather it only asks whether *this* ammunition background check system is unconstitutional. While Plaintiffs' briefing and the district court's orders provide many reasons why the answer to that question is "yes," the following encapsulates the undeniably fatal flaws

with the State's ammunition background check scheme.

Generally, it is impossible for the average Californian to purchase ammunition without acquiring it in-person from a licensed ammunition vendor and undergoing the State's background check. Cal. Pen. Code §§ 30312-330314, 30370. In just seven months, the State's most popular background check option has rejected 101,047 purchasers from receiving ammunition, not because the State confirmed that those people are legally ineligible to acquire ammunition, but because the State could not confirm that they were eligible. Emergency Mot. Ex. 9 at 6, Ex. 10 at 56. That is about 16.4% of attempted purchasers. *Id.*

Still worse than the initial rejection of the right, is the State's lack of care for it. Purchasers who are rejected ammunition are "not informed of the reason for rejection," at least not specifically *Id.* at 20, *see also Id.* at 21-26. Nor is official guidance on what steps they can take to remedy their situation provided; they are left to their own devices to figure it out. *Id.* Unlikely a coincidental result, *more than half* of purchasers rejected ammunition solely because the State could not confirm they are legally eligible have still not acquired ammunition since July 2019, and every month thereafter. Emergency Mot. Ex. 9 at 21. This is simply not the way fundamental rights work. If burdens imposed by a state's regulatory scheme resulted in this rate of attrition for voting, there would not even be a discussion; such a scheme would be dispensed with automatically.

B. The State's Requirement that All Ammunition Transfers Occur "Face-to-Face" Violates the Dormant Commerce Clause

While there are various reasons the State's "face-to-face" requirement violates the dormant Commerce Clause, Plaintiffs want to make sure that this Court understands that businesses physically located in California that sell ammunition have complete discretion over whether or at what price businesses not physically located in California can sell to people in California. This is because ammunition vendors that are not physically located in California can only sell to California purchasers by sending the ammunition to a vendor that is physically located in California. Cal. Penal Code §§ 30312(b). It is undisputed that ammunition vendors physically located in California may legally refuse to process third-party ammunition transfers from out-of-state ammunition vendors, or that they are, in fact, doing just that. Plaintiffs' Reply to Defendant's Opposition to Motion for Preliminary Injunction, *Rhode v. Becerra*, No. 3:18-cv-00802-BEN-JLB (Aug. 12, 2019), ECF No. 37 at 8 (attached hereto as Exhibit A); Emergency Mot. Ex. 10, at 3 n.2. Nor is it disputed that an in-state vendor willing to process such a transaction may charge the purchaser any fee amount it wishes. Ex. "A" at 8. "If the purchaser will not be present for immediate delivery of the ammunition, the vendor may charge an additional storage fee as agreed upon with the purchaser prior to the vendor receiving the ammunition Cal. Code Regs. tit. 11 § 4263(b). As a practical matter, this includes all transactions originating from out-of-state. In other words, ammunition vendors located in other states, like Plaintiffs

Able's Ammo, AMDEP Holdings, and R&S Firearms, are at the complete mercy of businesses located in California in accessing the California consumer.

The only way for ammunition vendors located in other states to avoid control of in-state vendors is to have a physical presence in California. This Court has made clear that a statute requiring a business to have a physical presence in a state to do business there violates the Commerce Clause. *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 736-37 (9th Cir. 2017), *cert. denied sub nom* (finding a statute violated the Commerce Clause because it "requires any corporation that wants to engage in a certain kind of business within the state to become a resident"); *see also Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.") The State's attempt to confuse the issue by arguing that the Challenged Provisions do not discriminate because in-state vendors are also prohibited from shipping ammunition, misses the point. Emergency Mot. 17-18. "What is important is that California's resident businesses are the only businesses that may sell directly to ammunition consumers." *Id.* Ex. 10 at 103. Because they can, the State violates the dormant Commerce Clause.

C. Plaintiffs Have Standing to Assert a Facial Challenge Here

The State argues that Plaintiffs lack standing to assert a facial challenge here. Plaintiffs have already extensively briefed why that is incorrect. Ex. A, at 1-2. And the district court has thoroughly corroborated Plaintiffs' position. Emergency Mot. Ex. 10, at 42-44. Rather than rehash those arguments, Plaintiffs merely wish to point out

that the notion that an organization like Plaintiff CRPA, which is dedicated to defending the Second Amendment rights of Californians, lacks standing to challenge a legal scheme that results in well over ten percent of Californians being rejected ammunition without an adequate official explanation of why they were rejected or how to remedy their rejection, and over half of whom have not acquired ammunition months after being rejected, is not only unsupported by any authority but is unconvincing—to be charitable. In any event, the State's arguments do not apply to Plaintiffs Able's, AMDEP, and R&S Firearms, who challenge the State's "face-to-face" requirement for violating the dormant Commerce Clause.

D. A Serious Legal Question Alone Does Not Justify Staying an Injunction

Finally, the State argues that a stay may be warranted because this case raises "serious legal questions." Emergency Mot. 10. "Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). Surely, the legal questions at the heart of this matter are "serious." *Silvester v. Harris*, No. 11-cv-2137, 2014 WL 661592, at *3 (Nov. 20, 2014) (recognizing that a case challenging California's 10-day waiting period for gun purchases raised serious questions because "Second Amendment law is evolving"). But this is true of many appeals, especially those involving constitutional challenges like this one. Thus, cases that raise important questions rarely warrant a stay of injunctive relief *unless the moving*

party also establishes that the remaining factors all counsel in favor of a stay. In such cases, the State must prove that it "will suffer irreparable harm" without the stay *and* that the balance of the hardships "tips *sharply* in their favor." *Se. Alaska Conserv. Council v. U.S. Army Corps of Eng'rs.*, 472 F.3d 1097, 1100 (9th Cir. 2006) (emphasis added). As explained below, and in more detail by the district court in its order granting the preliminary injunction, Emergency Mot. Ex. 10 at 109-114, and its order denying an emergency stay, *id.* Ex, 12 at 2, the State has failed to meet this burden.

II. THE STATE HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE HARM

As the State recognizes, "[t]he factor of irreparable harms is a 'bedrock requirement' for issuance of a stay." *Id.* at 18 (quoting *Leiva-Perez*, 640 F.3d at 965). Indeed, because the State must rely on the "serious legal questions" this case presents to satisfy the first factor for a stay, the State bears a heavy burden to show that it "will suffer irreparable" harm if a stay does not issue. *Se. Alaska*, 472 F.3d at 1100. Here, the State argues that it is necessarily harmed because the preliminary injunction prevents it from enforcing " 'an enactment of its people or representatives.' " *Id.* (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). It also argues that irreparable harm will befall the state if Californians are able to purchase ammunition unrestricted by the Challenge Provisions, while this case is on appeal because persons prohibited from ammunition possession might acquire it, implying they will commit crimes with it. Emergency Mot. 18-19. Neither of these purported harms justify a stay of the Court's well-reasoned judgment.

A party "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable . . . to allow the state . . . to violate the requirements of federal law.") (citations omitted). Even so, the State relies on a passage from *Coalition for Economic Equity v. Wilson*, which in turn relied on a chambers order from former Justice Rehnquist, to argue that the government necessarily suffers irreparable injury anytime its laws are enjoined. Emergency Mot. 18-19 (quoting *Coal. for Econ. Equity*, 122 F.3d at 719). But the "the Supreme Court has never adopted Justice Rehnquist's opinion that this form of harm is an irreparable injury" sufficient to justify a stay. *Silvester*, 2014 WL 661592, at *3 (citing *Latta v. Otter,* __ F.3d __, No. __, 2014 U.S.App. LEXIS 19828, *19 n.1 (9th Cir. 2014)).[1] As a result, this Court has held that "to the extent a state suffers an abstract form of harm whenever one of its acts is enjoined, that harm is *not dispositive* because such a rule would eviscerate the balancing of competing claims of injury." *Id.* (discussing *Indep. Living Ctr.*, 572 F.3d 644) (emphasis added). An "abstract harm" can be "outweighed by other factors." *Id.* (discussing *Latta*, 2014 U.S.App. LEXIS 19828).

The State also claims that it will be irreparably harmed if Californians are allowed to purchase ammunition unburdened by the Challenged Provisions because

[1] This Court has also held the cited language from *Coalition for Economic Equity* is "dicta." *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly,* 572 F.3d 644, 658 (9th Cir. 2009).

"violent felons and others who have had a significant impediment to their access to ammunition removed" might also acquire ammunition. *Id.* at 18-19. This speculative harm that prohibited persons might acquire ammunition and inflict harm with it does not constitute irreparable injury. *See, e.g.*, *Pac. Merchant Shipping Ass'n v. Cackette*, 2007 WL 2914961 (E.D. Cal. 2007) (holding that the defendant's claim that enjoined regulations would prevent 31 deaths and 830 asthma attacks is "nebulous at best" and insufficient to establish irreparable harm). The State's purported harm is at least not "probable," as it must be to justify a stay. *See Leiva-Perez*, 640 F.3d at 968.

Because a specific showing of irreparable injury to the applicant is a threshold requirement for every stay application, the State's failure to demonstrate that it will experience irreparable harm means that "a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Leiva-Perez*, 640 F.3d at 965.

III. THE STATE HAS NOT SHOWN THAT THE BALANCE OF HARMS TIPS IN ITS FAVOR

The State has failed to establish that it will suffer any irreparable harm absent a stay. And any abstract and speculative harms it might suffer do not outweigh the constitutional and practical harms that befall Plaintiffs. Each day the injunction is delayed is another day Californians are denied the exercise of their right to acquire ammunition free from the Challenged Provision's unlawful burdens. Denial of a fundamental right is irreparable injury—even if for a moment. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that deprivation of constitutional rights, "for even minimal

periods of time, unquestionably constitutes irreparable injury"). This ongoing constitutional harm is no less severe simply because, as the State argues, the exercise of that right has already been prohibited for several months. Emergency Mot. 19-20. In fact, it perhaps makes the continued denial of the right *worse*.

To the extent this Court considers relevant the State's complaint that the Challenged Provisions have been in place months before being preliminarily enjoined, Plaintiffs point to the district court's charitable explanation for why that happened:

> That the laws have been in effect for 10 months reflects this Court's patient consideration, not its constitutional approval. Any delay was occasioned by judicial optimism that the high erroneous denial rate of early Standard background checks might significantly improve. It did not. Instead, the constitutional impingements on Second Amendment rights that began immediately, will continue if a stay is granted.

Id. at Ex. 12, at 2.

The Court afforded the State several opportunities to provide evidence defending its objectively burdensome ammunition scheme and held various hearings to afford the State the opportunity to explain itself. *See* Docket, *Rhode v. Becerra*, No. 3:18-cv-00802-BEN-JLB (S.D. Cal. Apr. 23, 2020), ECF Nos. 40, 42, 48, 52, 53, 54, 56, 58, and 59. That the State failed to take advantage of those opportunities to makes its case should not now save its system from being enjoined.

What's more, the State cannot credibly argue that it will suffer any real harm by the issuance of this preliminary injunction. California is only *temporarily* having to return to how it has always regulated ammunition transactions. That is, it will be put

in essentially the same place as every other state in the country, none of which have ammunition background checks or, with the exception of New York, have restrictions on shipping ammunition directly to consumers. Emergency Mot. Ex. 10, at 2-3, fn. 2. The notion that *temporarily* enjoining such anomalous, short-lived laws causes the State harm sufficient to satisfy its extraordinarily high burden is dubious, at best.

Because the State cannot identify any concrete irreparable harm and given that a stay would allow the State to resume violating the fundamental rights of millions of Californians, the balance of equities does not tip sharply in the State's favor—it does not tip in its favor at all. The State's motion should be denied on this basis alone.

CONCLUSION

For these reasons, the Court should deny the State's motion for an emergency stay and immediately vacate the emergency administrative stay currently in place.

Date: April 30, 2020

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, an electronic PDF of APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL; MOTION TO VACATE ADMINISTRATIVE STAY was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: April 30, 2020

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