

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 District of California

No. 3:18-cv-00802 BEN JLB  
The Honorable Roger T. Benitez, Judge

**REPLY IN SUPPORT OF ATTORNEY  
GENERAL'S MOTION TO STAY  
PRELIMINARY INJUNCTION ORDER  
PENDING APPEAL**

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## INTRODUCTION

If this appeal proceeds without a stay, hundreds if not thousands of prohibited persons—including violent felons, the dangerously mentally ill, and others—will have unfettered, anonymous access to ammunition at their local firearms stores. Once those prohibited people purchase ammunition, getting it back will be next to impossible. If, by contrast, this Court stays the district court’s preliminary injunction decision pending resolution of this appeal, Kim Rhode and the other individual plaintiffs will continue to have quick and easy access to ammunition. For \$1 and a short wait, they, like the vast majority of firearms owners with a record in the State’s Automated Firearms System, can buy ammunition using a Standard Ammunition Eligibility Check (Standard Check).

Plaintiffs do not dispute this in their opposition, and nothing in the record or the law supported the wide-ranging facial injunction entered by the district court here—especially one entered nine months after plaintiffs filed their motion. The irreparable harm the State faces by prohibited persons acquiring ammunition outweighs the minimal burden that the background checks impose on plaintiffs; and the Attorney General has made a strong showing he will succeed on the merits. A stay is plainly justified under the circumstances.

## ARGUMENT

### I. THE ATTORNEY GENERAL HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

#### A. The Plaintiffs in This Case Do Not Have Standing to Seek Redress for Alleged Harms Experienced by Nonparties.

In response to the Attorney General’s standing argument, plaintiffs incorporate their district court briefing and the district court’s summary treatment of the issue. *See* Opp’n at 7-8 (citing Op. at 42-44). Neither plaintiffs nor the district court grapple with the undisputed fact that no plaintiff, including any identified member of plaintiff California Rifle & Pistol Association (CRPA), has shown that Prop. 63 prevents him or her from purchasing ammunition.

All the relevant evidence pertaining to plaintiffs shows that they can currently purchase ammunition using Standard Checks—a process that costs \$1 and takes on average about five minutes. *See* Morales Decl. ¶ 55 (Richards Decl. Ex. 8, 9th Cir. ECF No. 3-10). Yet the district court rested its Second Amendment holding largely on speculation about the experience of nonparties. For instance, in its intermediate scrutiny analysis, the district court stated that “the burden is that 101,047 law-abiding citizens (plus an untold additional number who may have been discouraged by the clumsiness of the system) were unable to exercise their Second Amendment right to acquire ammunition for their firearms.” Op. at 66; *see also, e.g., id.* at 52 (“[T]he California background check laws that *de facto* completely block some

law-abiding responsible citizens from buying common ammunition are unconstitutional.”).<sup>1</sup>

Plaintiffs do not have standing to seek redress for alleged injuries that are experienced by nonparties. “It is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.” *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). Plaintiffs asserting the rights of others must satisfy three criteria: an injury in fact, a close relation to the third party, and some “hindrance to the third party’s ability to protect his or her own interests.” *Id.* Here, nothing in the record establishes that plaintiffs have a close relation to those who allegedly cannot purchase ammunition because of Prop. 63, or that anything is hindering those people from protecting their own interests.

To be clear, the Attorney General does not argue that the individual plaintiffs, as firearms owners and ammunition purchasers, lack standing to challenge the law as it applies to them. But nothing in the record shows that they cannot use Standard Checks to purchase ammunition; and nothing shows that they experienced the

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<sup>1</sup> The district court’s premise that 101,047 residents were unable to exercise their Second Amendment rights is incorrect. As a preliminary matter, the court overstated the number of unique individuals who had a Standard Check rejected by 25%. *See* Third Supp. Morales Decl. ¶ 45 & table 2.3(Richards Decl. Ex. 9, 9th Cir. ECF No. 3-11). More importantly, anyone who has a Standard Check rejected may still purchase ammunition using a Basic Ammunition Eligibility Check (Basic Check), which costs \$19 and takes about two days. *Id.* ¶¶ 7-8.

purported burdens on purchasers that the district court relied on to preliminarily enjoin the law. Thus, to the extent plaintiffs are bringing as-applied challenges, those challenges would be no different from their facial challenge. And for the reasons discussed below, the Attorney General has made a strong, and indeed conclusive, showing that the district court erred by disregarding the standard for facial challenges.

The district court also erred by holding that plaintiff California Pistol & Rifle Association (CRPA) has organizational standing. *See Op.* at 43. It correctly observed that “[o]rganizations can assert standing on behalf of their own members, or in their own right.” *Id.* (quoting *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020)). “An organization suing on its own behalf can establish an injury when it suffered ‘both a diversion of its resources and a frustration of its mission.’” *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). CRPA, however, has not alleged any diversion of its resources, and thus has not established organizational standing.

To sue on behalf of its members, CRPA must establish, among other things, that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130-31 (9th Cir. 1996). As the experience of CRPA member Nandu



Ionescu shows, however, the reasons a purchaser may have a Standard Check rejected will vary. *See* Ionescu Decl. ¶¶ 2-11 (Richard Decl. Ex. 6, 9th Cir. ECF No. 3-8.); *see also* *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (“[W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof.”). Ionescu had a Standard Check rejected, but he was able to update his AFS record and, 10 days later, purchase ammunition using a Standard Check. Ionescu Decl. ¶¶ 3-5, 10.<sup>2</sup> With his AFS record updated, he can expect that his ammunition background checks will cost \$1 and take a matter of minutes. *See* Morales Decl. ¶ 55. Because the reasons rejections will vary, participation of individual members is necessary, and CRPA thus does not have standing to sue on behalf of its members.

**B. The District Court Erred by Not Applying the Standard That Governs Facial Challenges.**

While plaintiffs respond to the Attorney General’s standing arguments, they sidestep the equally important argument that the district court misapplied the standard for facial challenges. *See* Opp’n at 6-7. Despite recognizing that plaintiffs had brought a facial challenge, the district court did not discuss the governing standard, let alone correctly apply it. *See* Op. at 41. That standard requires plaintiffs to “establish that no set of circumstances exists under which the

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<sup>2</sup> Like any other purchaser who has a Standard Check rejected, Ionescu also could have purchased ammunition using a Basic Check.

[regulation or statute] would be valid.” *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 449 (2008) (recognizing that while some justices have disagreed with *Salerno*, “all agree that a facial challenge must fail where the statute has a plainly legitimate sweep”). Rather than judge the law on the experience of the 85% of Standard Checks that were processed, the district court judged the law on the 15% of Standard Checks that were rejected.<sup>3</sup> *See, e.g., Op.* at 66. That approach directly contravenes the principle that, in facial challenges, courts “may not resolve questions of constitutionality with respect to each potential situation that might develop, especially when the moving party does not demonstrate that the legislation would be unconstitutional in a large fraction of relevant cases.” *Jackson v. City & County of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014) (quotation marks omitted).

**C. The District Court Misapplied the Intermediate Scrutiny Standard.**

Plaintiffs’ opposition also does not address the Attorney General’s argument that he has a strong case that the district court committed reversible error by applying the wrong legal standard in its Second Amendment analysis. *See Mot.*

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<sup>3</sup> Invalidating the law based on the experience of the 15% of Standard Checks that were rejected is flawed for the additional reason that those purchasers could still buy ammunition using a Basic Check.

at 15-17; *see generally* Opp’n. Among other things, the district court disregarded *Silvester v. Harris*, 843 F.3d 816, 830 (9th Cir. 2016), which upheld a 10-day wait to purchase firearms, in part so the State can perform a background check. Here, the plaintiffs are challenging a background check that costs them \$1 and, as concerns them, takes minutes, not days. To invalidate this substantially less burdensome process, the district court applied a test akin to strict scrutiny rather than the intermediate scrutiny that this Court has applied time and again in similar cases. For example, this Court has recognized in the context of Second Amendment intermediate scrutiny that “a single courageous state may, if its citizens choose, serve as a laboratory, and try novel legislative experiments.” *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018) (cleaned up). Yet the district court held the novelty of California’s ammunition background check against the State, while ignoring that, for the vast majority of purchasers, including plaintiffs, the check differs little from the background check that anyone must go through to purchase a firearm. *See* Op. 89 (“That there is a dearth of direct evidence on the efficacy of a state-wide ammunition background check is not surprising. California is the only state to impose a background check.”).<sup>4</sup>

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<sup>4</sup> Troublingly, the district court’s decision condemns all background checks, not just ammunition background checks. *See, e.g.*, Op. 2 (“[C]riminals, tyrants, and terrorists don’t do background checks.”); *id.* at 93-94 (“It is a quixotic notion that criminals (and those bent on committing crimes) will abide by the law, and pay for

**D. The District Court’s Dormant Commerce Clause Analysis Relies on a Misreading of Precedent.**

Laws that require ammunition be sold in person in face-to-face transactions do not violate the dormant Commerce Clause. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d 349, 379-81 (W.D.N.Y. 2013). Neither the district court nor plaintiffs address the one decision to have decided that issue. *See* Op. at 96-109; Opp’n at 6-7. Instead, both argue based on a misapprehension of this Court’s decision in *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017). Relying on that case, they contend that Prop. 63 requires ammunition vendors to become residents of California. Op. at 103; Opp’n at 7. But the law at issue in *Nationwide* required out-of-state mortgage prorsaters that wanted to do business in California to incorporate in the State, thereby forcing them to become residents. 873 F.3d at 716 (“A corporation’s state of incorporation is one of its states of residency[.]” (citing 28 U.S.C. § 1332(c)(1)). Here, Prop. 63 has no similar incorporation requirement and does not otherwise require ammunition vendors to become residents of California. *See* Cal. Pen. Code §§ 30312, 30342-62.

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a background check where their identifiers are recorded and information about their firearms and ammunition is transmitted to law enforcement.”).

**II. IRREPARABLE HARM, THE BALANCE OF THE EQUITIES, AND PUBLIC INTEREST ALL WEIGH HEAVILY IN FAVOR OF A STAY**

All agree that California may bar prohibited persons—violent felons, the dangerously mentally ill, and the like—from purchasing ammunition. During each of the law’s first six months, about 125 prohibited people were prevented from purchasing ammunition. Third Supp. Morales Decl. ¶ 6 & tables 1.1, 2.1 (Richards Decl. Ex. 9, 9th Cir. ECF No. 3-11).<sup>5</sup> Yet under the district court’s order, they, and any other prohibited persons who have *not* tried to purchase ammunition during this time period, would have unfettered access to ammunition, at least until this appeal is resolved. And once they have acquired ammunition, there will be no way to prevent them from using it in crimes or suicide, and no way to learn who they are so the ammunition can be taken away from them. The State and its residents will indisputably be harmed from such an order. *See, e.g., Washington v. U.S. Dep’t of State*, 315 F. Supp. 3d 1202, 1206 (W.D. Wash. 2018) (issuing temporary restraining order and finding state plaintiffs had shown a likelihood of irreparable harm where federal government’s actions created the prospect of the “proliferation” of 3D-printed firearms); *Washington v. U.S. Dep’t of State*, 318 F. Supp. 3d 1247, 1261-62 (W.D. Wash. 2018) (granting preliminary injunction in

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<sup>5</sup> This represents a low estimate for the number of prohibited people who will purchase ammunition each month while this appeal is pending because the background check requirement almost certainly has deterred a large number of prohibited persons from purchasing ammunition.

same case and finding increase in untraceable 3D-printed firearms would “likely increase the threat of gun violence [state plaintiffs] and their people experience”).

Plaintiffs’ only response to this is to say that his harm is speculative. Opp’n at 11. But they do not dispute that hundreds of prohibited persons have already attempted to purchase ammunition; nor do they dispute that, under the district court’s order, many more would do so.

In any event, plaintiffs themselves would suffer (at most) minimal harm if this Court enters a stay pending resolution of this appeal. Every individual plaintiff is currently able to purchase ammunition in transactions that take a matter of minutes and cost \$1. As for the out-of-state business plaintiffs, they waited over 18 months to challenge the provisions restricting direct-to-purchaser shipment of ammunition. *See* Cal. Pen. Code § 30312(b) (face-to-face transaction requirement went into effect January 1, 2018); Dist. Ct. ECF No. 32 (plaintiffs’ preliminary injunction motion filed July 22, 2019). Long delays in seeking injunctive relief weigh against finding any harm. *See, e.g., Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.”).

## CONCLUSION

This Court should grant the motion and stay the district court’s preliminary injunction order for the duration of this appeal.

Dated: May 7, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Case Name: **Rhode, Kim, et al. v. Xavier  
Becerra, et al. [APPEAL 9th  
Cir.]**

No. **20-55437**

I hereby certify that on May 7, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**REPLY IN SUPPORT OF ATTORNEY GENERAL'S MOTION TO STAY  
PRELIMINARY INJUNCTION ORDER PENDING APPEAL**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 May 7, 2020, at Sacramento, California.

Eileen A. Ennis

Declarant

*/s/ Eileen A. Ennis*

Signature