

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KIM RHODE; et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity
as Attorney General of the State of
California,

Defendant-Appellant.

No. 20-55437

D.C. No.

3:18-cv-00802-BEN-JLB

Southern District of California,
San Diego

ORDER

Before: SILVERMAN, NGUYEN, and COLLINS, Circuit Judges.

This appeal challenges the district court’s preliminary injunction prohibiting the enforcement of California restrictions on the purchase of ammunition on Second Amendment and dormant Commerce Clause grounds. The California Attorney General moves for a stay of the injunction pending appeal.

In evaluating a motion for stay pending appeal we 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.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Appellant satisfies the first factor because he has “show[n], at a minimum, that [he] has a substantial case for relief on the merits.” *See Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). As the Supreme Court recognized in *Heller*, Second Amendment rights are not unlimited. *See District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (“[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.”); *see also Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 970 (9th Cir. 2014) (Second Amendment right to purchase ammunition “may be subjected to governmental restrictions which survive the appropriate level of scrutiny”). The dormant Commerce Clause does not prohibit a state from enforcing a law that does not “discriminate[] against or directly regulate[] interstate commerce” and is not “clearly excessive in relation to the putative local benefits.” *See Pharmaceutical Research & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1041-46 (9th Cir. 2014) (citations omitted).

Appellant has also shown sufficient likelihood of irreparable harm absent a stay, and that the remaining factors favor a stay. The provisions of state law at issue were in effect for more than nine months before the district court’s preliminary injunction. Appellees do not contend that they were unable to purchase ammunition lawfully and with minimal delay while those provisions were in effect. *See, e.g., Teixeira v. County of Alameda*, 873 F.3d 670, 681 (9th Cir.

2017) (en banc) (“[M]issing is any allegation by [appellant] that any honest-to-God resident . . . cannot lawfully buy a gun nearby.” (internal quotation marks and citation omitted)).

We therefore grant appellant’s emergency motion (Docket Entry No. 3) for a stay of the district court’s April 23, 2020 preliminary injunction pending appeal.