

No. 20-55437

IN THE

**United States Court of Appeals  
for the Ninth Circuit**

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KIM RHODE, et al.,

*Plaintiffs-Appellees,*

v.

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

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of California  
No. 3:18-cv-00802 BEN JLB (Benitez, J.)

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**BRIEF OF *AMICUS CURIAE* BRADY IN SUPPORT OF  
APPELLANT XAVIER BECERRA AND REVERSAL**

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All parties have consented to the filing of this brief.

## **CORPORATE DISCLOSURE STATEMENT**

Brady has no parent corporations and no stock. Therefore, no publicly held company owns 10% or more of its stock.

s/ Michael K. Plimack

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## **INTEREST OF *AMICUS CURIAE***

Brady is one of the nation’s oldest and largest nonpartisan, non-profit organizations dedicated to reducing gun violence through education, research, and direct legal advocacy on behalf of victims and communities affected by gun violence. Given that Brady’s sister organization led the fight for the federal Brady law that ended the “lie and buy” system and required background checks for firearms sales by licensed dealers, the law at issue is of particular importance to Brady. Brady files this brief as *amicus curiae* in support of Appellant the Attorney General of the State of California, and in support of reversal.<sup>1</sup>

Brady has a substantial interest in ensuring that the Second Amendment is not interpreted or applied in a way that would jeopardize the public’s interest in protecting individuals, families, and communities from the effects of gun violence. Brady has filed amicus briefs in numerous cases involving firearms regulations. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 870 n.13, 887 n.30, 891 n.34 (2010) (Stevens, J., dissenting) (citing Brady brief); *United States v. Hayes*, 555 U.S. 415, 427

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<sup>1</sup> No party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus or its counsel contributed money that was intended to fund preparing or submitting this brief.

(2009) (citing Brady brief); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406 (7th Cir. 2015), *cert. denied* 136 S. Ct. 447 (2015).

## ARGUMENT

### I. Introduction

Individuals with felony convictions, domestic abusers, and other “prohibited persons” have no right to buy ammunition, and the State has the authority to ensure that they cannot do so. Requiring background checks is a reasonable and permissible measure to determine whether prohibited persons are attempting to buy ammunition and to prevent them from obtaining it.

Amicus joins all of the State’s arguments for reversing the lower court’s preliminary injunction and allowing the California Department of Justice (DOJ) to continue performing background checks of ammunition buyers. The State has shown that the Plaintiffs did not establish any of the four elements required for a preliminary injunction.<sup>2</sup> Brady submits this

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<sup>2</sup> *Cf. Jackson v. City and County of San Francisco*, 746 F.3d 953, 958 (9th Cir. 2014) (a preliminary injunction requires the plaintiff to “establish that (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest”) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).



amicus brief to contribute additional argument on two of those elements: likelihood of success on the merits and balance of the equities.

First, Plaintiffs have not established that they are likely to prevail on the merits of their Second Amendment claims. Ammunition sales to individuals with felony convictions and other “prohibited persons” contribute to gun crime, and background checks of ammunition buyers are a reasonable and constitutional way to reduce these sales.<sup>3</sup> Intermediate scrutiny requires only that a law “promote[] a substantial government interest that would be achieved less effectively absent the regulation.”<sup>4</sup> Given that any background check system must balance convenience and effectiveness, California’s background check system surpasses this standard. It is as convenient as it can be if it is to prevent most or all sales to prohibited persons—that is, if it is to serve the purpose of the law and to reduce gun crime.

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<sup>3</sup> See *Jackson*, 746 F.3d at 959 (“[T]he Second Amendment does not preclude . . . ‘prohibitions on the possession of firearms by felons and the mentally ill’ [or] ‘laws imposing conditions and qualifications on the commercial sale of arms[.]’”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008)).

<sup>4</sup> *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (internal quotation marks omitted).

Second, the balance of equities weighs heavily towards allowing the background checks to continue as the suit below proceeds. On the Plaintiffs' side, the background checks were in place for nine months before the District Court enjoined them, but the only injuries that Plaintiffs discuss in their pleadings and declarations are the various inconveniences that would attend any background check system: delayed purchases, occasional inaccuracies, lost sales, and the like.

On the side of the State and the public interest, however, in seven months of operation, the background checks prevented 760 prohibited persons from buying ammunition from licensed vendors, and likely deterred many more from attempting to do so.<sup>5</sup> Although some of these people may have found illegal alternative suppliers, no doubt many did not. In short, the background checks are working. But if the checks are enjoined for the remainder of the suit, it is likely that hundreds of prohibited persons will buy ammunition from licensed vendors. If even a fraction of those people go on to use that ammunition on themselves or others, there is no question where the balance of the equities lies.

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<sup>5</sup> See Appellant's Excerpts of Record (ER) 251, 255 (tables showing that 572 and 188 prohibited persons were rejected by the basic and standard background checks, respectively, in seven months).

Because the Plaintiffs are unlikely to succeed on the merits and because the balance of equities favors allowing the background checks to continue, the grant of a preliminary injunction should be reversed.

**II. Plaintiffs' Second Amendment claims will likely fail because the background check law reasonably fits the important government objective of preventing crime.**

The court below and both parties agree that California's background check law must be analyzed under the intermediate scrutiny standard.<sup>6</sup> A law passes intermediate scrutiny as long as there is a "reasonable fit" between the law and "a significant, substantial, or important government objective."<sup>7</sup> Appellees concede the importance of this law's objectives, "increasing public safety and preventing crime," as did the district court below.<sup>8</sup> However, the district court erred in its determination that there was not a reasonable fit between the background checks and these objectives.

Brady addresses this point in three parts. First, ammunition sales to prohibited persons implicate public safety and crime, so it is reasonable to

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<sup>6</sup> See ER 60–96 (order below), 980–90 (Defendant's brief below), 1621–28 (Plaintiffs' brief below).

<sup>7</sup> *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018).

<sup>8</sup> See ER 64 (order below, stating that "few would dispute that the state has a legitimate interest in increasing public safety and preventing crime"), 1622 (Plaintiffs' brief below, stating that "keeping ammunition away from dangerous people" is "a valid interest, to be sure").

try to improve public safety and prevent crime through a law that targets ammunition sales to prohibited persons. Second, background checks in general are a reasonable fit for the goal of reducing ammunition sales to prohibited persons. Third, the way that California conducts background checks under the challenged law is also a reasonable fit for this goal.

**A. Ammunition sales to prohibited persons contribute to crime.**

Until California passed its ammunition background check law, a person convicted of a felony, subject to a restraining order, or with a severe mental illness (a “prohibited person”) could buy ammunition in a store or online without any background check or questions.<sup>9</sup> Because ammunition sales aren’t widely recorded, it’s hard to quantify the harm caused by sales to prohibited persons—hard to quantify, but impossible to deny.

Police investigating illegal gun possession come across hundreds of thousands of rounds of illegally owned ammunition each year.<sup>10</sup> In one

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<sup>9</sup> See Cal. Prop. 63, The Safety for All Act of 2016, § 2.7 (finding that “any violent felon or dangerously mentally ill person can walk into a sporting goods store or gun shop in California and buy ammunition, no questions asked”), *available at* <https://lawcenter.giffords.org/wp-content/uploads/2015/10/SafetyForAllActFinal.pdf> (last visited June 17, 2020).

<sup>10</sup> See SB 140 Supplemental Report of the 2015–16 Budget Package, Armed Prohibited Persons System, at 22 (Jan. 1, 2016), <http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/sb-140-supp->

example, police recovered “approximately 3,500 rounds of various calibers of ammunition” from the home of a man barred by a domestic violence restraining order from possessing guns or ammunition, along with 18 guns and sundry other weapons.<sup>11</sup> And according to one study, during just two months in 2006, ten retail outlets in Los Angeles sold over 10,000 rounds to individuals convicted of felonies and other illegal purchasers.<sup>12</sup>

Unregulated ammunition sales also play a role in mass shootings. In 2012, a man in Aurora, Colorado bought over 6,000 rounds of ammunition—online. Then he shot and killed 12 people at a movie theater and injured many more. In the weeks leading up to the shooting, the owner of a shooting range described the man as “rambling incoherently” in a

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budget-report.pdf (in the 2.5 years before enactment of Proposition 63, APPS enforcement teams recovered nearly 1,000,000 rounds of illegally owned ammunition); Armed and Prohibited Persons System SB 140 Legislative Report Number Four, Calendar Year 2017, at 2 (Mar. 9, 2018), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/armed-prohib-person-system-2017.pdf> (in 2017 alone, officials recovered 819,343 rounds of illegally owned ammunition).

<sup>11</sup> Armed and Prohibited Persons System SB 140 Legislative Report Number 5, Calendar Year 2018, at 31 (Mar. 1, 2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/armed-prohib-person-system-2018.pdf>.

<sup>12</sup> G.E. Tita, et al., *The Criminal Purchase of Firearm Ammunition*, 12 *Inj. Prevention* 308, 308, 310 (Oct. 2006) (noting that a background check at the time of transaction would have largely eliminated retail sales to these prohibited individuals).

“nearly incomprehensible” way.<sup>13</sup> If he had been required to buy his ammunition in person from licensed vendors, they likely would have recognized these obvious warning signs, and they could have blocked the sale or even reported him to law enforcement.

This problem of prohibited persons’ ready access to ammunition feeds the broader problems of gun-related crime, injury, and death. In California, about 3,000 people are killed each year by guns,<sup>14</sup> including an average of four police officers feloniously (not accidentally) killed.<sup>15</sup> These deaths disproportionately strike people of color: for example, in 2017, although Blacks and Latinos together made up only 44 percent of California’s population, they made up 79 percent of its homicide victims.<sup>16</sup>

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<sup>13</sup> See Jack Healy, *Suspect Bought Large Stockpile of Rounds Online*, N.Y. Times (July 22, 2012), <https://www.nytimes.com/2012/07/23/us/online-ammunition-sales-highlighted-by-aurora-shootings.html>.

<sup>14</sup> See *Firearm Mortality by State*, Centers for Disease Control and Prevention, [https://www.cdc.gov/nchs/pressroom/sosmap/firearm\\_mortality/firearm.htm](https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm) (last visited June 17, 2020) (reporting annual firearm deaths in California in 2018: 3,040; 2017: 3,184; 2016: 3,184; and 2015: 3,095).

<sup>15</sup> See *2019 Law Enforcement Officers Killed & Assaulted*, Table 1, Federal Bureau of Investigation, <https://ucr.fbi.gov/leoka/2019/tables/table-1.xls> (last visited June 17, 2020) (reporting the number police officers feloniously killed in California per year in 2010–2019).

<sup>16</sup> See Center for America Progress, *California Gun Violence* (November 2019),

Women are also uniquely vulnerable to gun crime. Of female murder victims, about a quarter died because they were shot by their spouse or intimate partner.<sup>17</sup>

“Prohibited persons” have traditionally been prohibited from buying guns because the Legislature has concluded that they are much more likely than others to commit these crimes and to cause these deaths. But guns are not the whole problem: the easier it is for prohibited persons to acquire ammunition, the graver these problems will be.

**B. Background checks reasonably fit the goal of preventing prohibited persons from getting ammunition.**

The district court's decision repeatedly questions whether background checks work at all, using the catchphrase “criminals don’t do background checks” and colorfully describing how criminals will go “underground” to buy ammunition.<sup>18</sup>

However, consistent with Supreme Court authority, the Ninth Circuit has held that background checks in general do not infringe Second

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<https://cdn.americanprogress.org/content/uploads/2019/11/18061930/CaliforniaGunViolence-Factsheet.pdf>.

<sup>17</sup> *See id.*

<sup>18</sup> *See* ER 2, 30–33, 69.

Amendment rights.<sup>19</sup> In their briefing below, Plaintiffs conceded that “certain ammunition background check and registration systems may substantially further public safety.”<sup>20</sup> This means that Plaintiffs’ Second Amendment argument must be evaluated with respect to this specific background check law, not to background checks in general.

The lower court’s argument about criminals going underground is also not consistent with experience. A background check law may drive some prohibited persons to get their ammunition from illegal channels. Others, however, will be prevented from getting ammunition at all, because they cannot or will not access these channels. Thus the lower court erred by making the perfect the enemy of the good: even if background checks are not infallible, they keep ammunition out of the hands of many prohibited buyers. In general, background checks reasonably fit the goal of reducing

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<sup>19</sup> See *Jackson v. City and County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014) (“[T]he Second Amendment does not preclude . . . ‘prohibitions on the possession of firearms by felons and the mentally ill’ [or] ‘laws imposing conditions and qualifications on the commercial sale of arms[.]’”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008)); see also *Pena v. Lindley*, 898 F.3d 969, 1009 n.19 (9th Cir. 2018) (Bybee, J., conc.) (conceptualizing background checks, constitutional in principle under *Heller*, as a form of “regulations in support of *who* may lawfully possess . . . firearms” rather than as conditions on sale).

<sup>20</sup> ER 1622.



crime as long as this deterrent effect is large enough to justify the inconvenience of the system.

In this same vein, the decision criticizes at length the State's statistical evidence that background checks on ammunition buyers will reduce crime. In the absence of direct studies on this topic (which would be nearly impossible to conduct), the State cites several studies showing that in the absence of a background check, prohibited persons make up about 3 percent of ammunition customers in ordinary retail channels.<sup>21</sup> To counter this, the decision quotes a prediction that the 3 percent figure will be as low as 0.8 percent when a background check is in place, attributing this change not to reduced ammunition sales, but instead to prohibited buyers being driven underground.<sup>22</sup>

The district court's decision assumes without any support that every single prohibited person will find an alternative illegal source for ammunition. As noted, however, it is likely that many prohibited persons will not do so, and that the background check will therefore prevent them from getting ammunition altogether.

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<sup>21</sup> See ER 80, 83.

<sup>22</sup> See ER 81–85.

Based on the percentages in the study, suppose that without a background check, there were 300 prohibited persons attempting to buy ammunition through ordinary channels. (They were also all succeeding.) If the quoted percentages are taken at face value, then after a background check is put in place, 80 prohibited persons will still attempt the transaction, while 220 will not.<sup>23</sup> Is it reasonable to assume, as the decision below does, that all 300 will eventually find an “underground” channel for their ammunition?

The 80 prohibited persons who still attempted the legal transaction seem unlikely to find an underground channel, as their attempt to pass a background check and purchase ammunition legally suggests obliviousness to the law or the inability to find another source. As for the remaining 220, some may go underground, but there are others who will be savvy enough to know that they would fail the background check but who cannot, or will not bother to, find an illegal source. In this category might be found, for instance, a member of the professional class who is subject to a restraining order, or an intelligent person with a dangerous mental illness.

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<sup>23</sup> In other words, 26.7 percent of prohibited persons will still attempt the transaction (0.8 percent divided by 3 percent).

Returning to the State’s data that about 3 percent of retail customers are prohibited persons, the decision below also emphasizes the “unnecessary inconvenience” of a background check system if 97 percent of customers are legal buyers.<sup>24</sup> But in fact this inconvenience is utterly necessary if a background check is to be employed at all. Background checks in themselves are not unconstitutional; instead, like many laws, they require a sacrifice of some convenience for the sake of public safety.

Intermediate scrutiny requires only that the State’s evidence “fairly support” the notion that a background check on ammunition purchases will reduce crime.<sup>25</sup> The State’s studies put numbers on the logic of a background check: they establish that a non-trivial number of prohibited persons regularly purchase ammunition through ordinary retail channels, reasonably supporting the inference that if prohibited persons can be cut off from this source of ammunition, gun crime will go down. These studies “fairly support” the premise that ammunition background checks will work. Therefore, in general, background checks of ammunition purchases reasonably fit the objective of reducing crime.

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<sup>24</sup> See ER at 81.

<sup>25</sup> *Jackson*, 746 F.3d at 969.

**C. The way that the ammunition background checks are conducted reasonably fits the law's objectives.**

Having established the general principle that ammunition background checks are reasonably fitted to reducing crime, this brief now turns to the details of California's law. The decision below focuses on the various difficulties a person might face in attempting to buy ammunition. But these difficulties do not amount to an unreasonable fit between the law and its goals; instead, they are the kind of necessary inconveniences that would attend any effective background check system.

The lower court's decision focuses on the two most common forms of background check. First, California already maintains databases of legal gun owners and prohibited persons. As a result, about 95 percent of background checks are "standard checks," which take the form of checking the buyer's identity against these databases: if the buyer is a legal gun owner and not a prohibited person, the sale is approved.<sup>26</sup>

The decision below objects that this method yields false rejections, and that many of these false rejections are a result of the buyer's address or other information having changed from what is in his or her database

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<sup>26</sup> See ER 18–19 (order below, stating that 616,257 out of 640,000 people attempting to buy ammunition undergo this kind of background check); see also ER 948 (declaration below, describing this form of background check).

entry.<sup>27</sup> However, if this type of background check is to be effective, the buyer's identification must positively match the exact name, address, and birth date of a person who is allowed to own a gun. In contrast, a mere "negative [background] check," which allows a sale unless a person is on a list of prohibited persons, can be thwarted easily, for example by the use of a fictitious name.<sup>28</sup> The perceived inconvenience of correcting discrepancies is actually essential to making this system work—which it does "more often than not," as the decision below acknowledges.<sup>29</sup>

The second form of background check, the "basic check," involves manually checking the buyer's information against DMV databases and four different lists of prohibited persons.<sup>30</sup> The decision below complains that this method is slow, taking an average of one to two days and therefore often requiring "a return trip to the same store on another day."<sup>31</sup> But

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<sup>27</sup> See ER 19–21.

<sup>28</sup> See U.S. General Accounting Office, *Firearms Purchased from Federal Firearm Licensees Using Bogus Identification*, 2 (2001), <https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-01-427/pdf/GAOREPORTS-GAO-01-427.pdf>.

<sup>29</sup> ER 19.

<sup>30</sup> See ER 26–28.

<sup>31</sup> ER 28.

checking a buyer against all of these listings necessarily takes time, and a less thorough check would be less effective.

Both of the lower court's concerns may be addressed through an understanding of the inescapable trade-off between two forms of accuracy: if a test is going to catch everyone that it is designed to catch, it is likely going to catch extra people as well ("false positives"); conversely, if a test is never going to catch anyone that it should not, it will also let through many people that it should have caught ("false negatives").<sup>32</sup> A background check designed to accurately reject most or all prohibited persons will also inaccurately reject some people who may legally buy ammunition. Conversely, a background check designed to accurately approve most people who may legally buy ammunition will also inaccurately approve some people who are not. To put this starkly, there is a trade-off between convenience and safety.

But this trade-off says nothing about the law's validity: courts have always understood that the state's authority to protect public safety

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<sup>32</sup> See generally *United States v. Mitchell*, 365 F.3d 215, 239–40, 239 n.19 (3d Cir. 2004) (discussing false positives, false negatives, and the trade-off between them in the context of fingerprint identification); Casey Williams, *Concealed Firearms Licensing and the Need for Expanded Discretion in the Use of Criminal Records*, 66 DePaul L. Rev. 935, 940 (2017) (discussing types of error in the context of criminal background checks).

constrains all rights under the Constitution.<sup>33</sup> And given the state’s prime duty to protect the public from violence, any analysis of constitutionality under the Second Amendment must recognize that “the risks created by firearms are unique among constitutional rights inasmuch as firearms pose a risk of imminent lethality.”<sup>34</sup> No other constitutional right empowers individuals “to cause serious personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly”—and “[a] person wrongly killed cannot be compensated by resurrection.”<sup>35</sup> As the Court weighs the inconvenience that the background checks sometimes cause, it should hold in mind the gravity of the state’s responsibility to guard against this unique and ultimate risk.

Here, false rejections are inevitable if background checks are going to catch most or all prohibited persons. And inconvenience to legal buyers is a necessary byproduct of pursuing this form of accuracy. In other words, the

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<sup>33</sup> See, e.g., *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (recognizing a “public safety” exception to the Miranda warnings required under the Fifth Amendment); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (recognizing the incitement exception to the First Amendment).

<sup>34</sup> Jonathan Lowy & Kelly Sampson, *The Right Not To Be Shot: Public Safety, Private Guns, and The Constellation of Constitutional Liberties*, 14 *Geo. J.L. & Pub. Pol’y* 187, 191 (2016).

<sup>35</sup> *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012).

attributes to which the decision below objects will be found in any background check system that serves the objective of preventing crime.

Given that it could not have escaped this trade-off, California's background check system runs remarkably smoothly. For about 80 percent of people who may legally buy ammunition, the background check delays their purchase by around 5 to 20 minutes, or even less.<sup>36</sup> For many of those wrongly rejected, the rejection will prompt them to update their information in California's database of gun owner, or to register in that database for the first time, which will allow them to receive a quick approval the next time that they buy ammunition.<sup>37</sup>

These corrections or updates are mildly inconvenient for the wrongly rejected buyers—but they also make California's gun owner database more accurate and thereby advance the law's goal of public safety. Moreover, the

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<sup>36</sup> See ER 18–19 (order below, stating that in the available data, 626,257 out of 640,000 buyers, that is, about 95 percent, underwent the first form of background check; 188 of them were prohibited persons, leaving 616,069 who were not; and 101,047 permitted persons were wrongly rejected, meaning that 515,022 were approved, or about 80 percent of lawful buyers); see also ER 987 (Defendant's brief below, quoting figures from Plaintiffs' declarations of "5–20 minutes" and "on average 15–25 minutes," and stating that the DOJ's own records indicate an average of "just under five minutes" in July).

<sup>37</sup> See ER 20–23 (order below, describing possible consequences of a rejected check).



rate of inaccurate rejections will likely be highest when the background check is first implemented and go down as more lawful buyers are nudged by an incorrect rejection to update and improve the database.

The background checks also advance the goal of public safety in another way. When prohibited persons attempt to buy ammunition and are rejected by a background check, their information is reported to police, who can infer that they are in illegal possession of a firearm and thereby obtain a search warrant.<sup>38</sup> In one month alone, police using this method seized 51 illegally owned guns—including assault weapons and guns with their serial numbers illegally removed—28,518 rounds of ammunition, 116 grams of methamphetamine, and four grams of heroin.<sup>39</sup> In these instances, the background checks did not “drive criminals underground” as the decision below fears—they did the exact opposite, enabling police to spot and catch criminals when they came up from underground.

California’s background check law operates as smoothly as practicable, if the accurate identification of prohibited persons is to be the

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<sup>38</sup> See Hannah Wiley, *Ammunition Background Checks in California Uncover ‘Ghost’ Guns, Heroin and More*, Sacramento Bee (May 19, 2020), <https://www.sacbee.com/news/politics-government/capitol-alert/article242846551.html>.

<sup>39</sup> See *id.*

priority. It also helps police identify prohibited persons who may illegally own guns. Intermediate scrutiny requires only that the background check law “promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>40</sup> The background check law easily satisfies this standard.

### **III. The balance of equities weighs heavily towards continuing the background checks.**

The Ninth Circuit has held that “when the government is a party” to proceedings seeking to enjoin enforcement of a law, the balance of the equities and the public interest “merge.”<sup>41</sup> This is because the government is assumed to act on behalf of the public when it passes a law.<sup>42</sup> Therefore, analyzing the balance of equities here requires comparing the harm to Plaintiffs from letting the background checks continue with the harm to the public from ending them.

The decision below appears to misunderstand this element. In considering the possible hardships to the Defendant’s side, the decision

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<sup>40</sup> *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (internal quotation marks omitted).

<sup>41</sup> *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

<sup>42</sup> *See Golden Gate Rest. Ass’n v. City and County of San Francisco*, 512 F.3d 1112, 1126–27 (9th Cir. 2008) (quoting a treatise that “[t]he public interest may be declared in the form of a statute”).

counts only the potential “hardship on the state” from the injunction, not the hardship to the wider public.<sup>43</sup> Remarkably, the decision does not acknowledge even the possibility that background checks might serve the public interest.

The decision does briefly consider the public’s interest, but only its interest in *granting* the injunction: “The public interest favors the exercise of Second Amendment rights by law-abiding responsible citizens.”<sup>44</sup> Indeed; the public interest also favors denying Second Amendment rights to prohibited persons, as the background checks are designed to do. The decision further states that “[i]t is always in the public interest to prevent government from violating a citizen’s constitutional rights.”<sup>45</sup> But this statement begs the question of the merits of Plaintiffs’ claim, whereas the analysis of this element should set aside the merits to consider only the likely effects of granting versus denying the injunction.

Correctly analyzed, the balance of hardships weighs heavily towards allowing the background checks to continue. In the Plaintiffs’ case, there is no need to guess at the harm from continuing the background checks: as

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<sup>43</sup> See ER 113–14.

<sup>44</sup> ER 115.

<sup>45</sup> ER 115.

this Court noted in its order staying the injunction, the background checks “were in effect for more than nine months before the district court’s preliminary injunction.”<sup>46</sup> Despite this, Plaintiffs’ declarations establish remarkably little hardship.

The Plaintiff buyers declare that a preferred retailer stopped selling ammunition for a week when the background checks began, that online purchases have become impossible,<sup>47</sup> and that on one occasion, a purchase transaction took “nearly 30 minutes.”<sup>48</sup> The Plaintiff vendors—who are all located outside of California—declare a loss of sales to California customers;<sup>49</sup> difficulty collecting “restocking fee[s]”;<sup>50</sup> and difficulty contacting the California DOJ to ask a question about the law.<sup>51</sup>

In view of this evidence, this Court concluded that Plaintiffs have not established even “that they were unable to purchase ammunition lawfully and with minimal delay” during that time<sup>52</sup>—let alone that they have

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<sup>46</sup> Order, ECF No. 13-1 (staying injunction pending this appeal).

<sup>47</sup> ER 1544, ¶¶ 3–4.

<sup>48</sup> ER 1547, ¶¶ 3–4.

<sup>49</sup> ER 1550, ¶¶ 3–7; ER 1554, ¶¶ 3, 6–8.

<sup>50</sup> ER 1554, ¶ 5.

<sup>51</sup> ER 1551, ¶ 8.

<sup>52</sup> Order, ECF No. 13-1 (staying injunction pending this appeal).

suffered or will likely suffer “the most serious kind of irreparable harm a person can suffer,” as the decision below dramatically put it.<sup>53</sup> It appears that the harm to Plaintiffs from continuing the background checks has been and will continue to be minimal.

Far graver is the potential harm to the public from ending the background checks. From July 2019 to January 2020, the two main forms of background check rejected 760 prohibited persons who attempted to buy ammunition.<sup>54</sup> They also likely deterred many other prohibited persons from even attempting to buy ammunition through a licensed vendor. No doubt some of these people found illegal alternative sources, but many did not. Based on this data, if the injunction below is upheld, then in the coming months, it is likely that hundreds of prohibited persons will buy ammunition through ordinary retail channels who would not otherwise have acquired ammunition at all. If even a fraction of those people go on to use that ammunition against themselves or others, there is no question where the balance of the equities lies.

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<sup>53</sup> ER 116.

<sup>54</sup> See ER 251, 255 (tables showing that 572 and 188 prohibited persons were rejected by the basic and standard background checks, respectively, in seven months).

## CONCLUSION

The law at issue aims to prevent dangerous people from acquiring ammunition, and it does so through reasonable, constitutional means: a carefully designed background check system. This system makes use of California's extensive existing records of gun owners and prohibited persons, approves 80 percent of lawful buyers within minutes, and will become even more accurate over time.

The suit below will likely go on for many more months. If the background checks are allowed to continue during that time, they will prevent hundreds of prohibited persons from buying ammunition while making it only slightly less convenient for some Plaintiffs to buy ammunition. If the background checks are enjoined, Plaintiffs will be spared that inconvenience, but those prohibited persons will buy that ammunition and use it.

“A preliminary injunction is an extraordinary remedy never awarded as of right,” says the U.S. Supreme Court.<sup>55</sup> The decision below awarded Plaintiffs a preliminary injunction even though they are unlikely to succeed on the merits of their Second Amendment claims and even though the

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<sup>55</sup> Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24 (2008).

balance of equities strongly favors allowing the background checks to continue to prevent injury and death from guns. It must be reversed.

Respectfully Submitted,

s/ Michael K. Plimack

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FOR THE NINTH CIRCUIT

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