

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

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

APPELLANT'S EXCERPTS OF RECORD

VOLUME 2 OF 7

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Attorneys for Defendant-Appellant

Pursuant to Federal Rules of Appellate Procedure for the Ninth Circuit, Rule 30-1, Appellant Xavier Becerra, by and through his attorney of record, Nelson R. Richards, hereby confirms the contents and form of Appellant's Excerpts of Record on Appeal.

Dated: June 12, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

S/ NELSON R. RICHARDS
NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Appellees

INDEX

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
4/23/20	60	Order Granting Plaintiffs' Motion for Preliminary Injunction	1	ER 1-120
4/24/20	66	Order of USCA as to Notice of Interlocutory Appeal to the 9 th Circuit Filed by Xavier Becerra	1	ER 121
4/24/20	65	Notice of Interlocutory Appeal to the 9 th Circuit filed by Xavier Becerra	1	ER 122
4/24/20	64	Notice of Interlocutory Appeal to the 9 th Circuit as to Order Granting Plaintiff's Motion for Preliminary Injunction	1	ER 123-126
4/24/20	62	Order Denying Ex Parte Motion for Stay	1	ER 127-129
4/24/20	61	Defendant's Motion to Stay Order Granting Preliminary Injunction to Allow for Interlocutory Appeal	2	ER 130-133
4/10/20	59	Fourth Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier	2	ER 134-154

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
		Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction		
4/10/20	58	Defendant's Response to Court's Inquiry at April 1, 2020 Status Conference	2	ER 155-162
4/6/20	57	Transcript of April 1, 2020 Status Conference	2	ER 163-233
4/1/20	56	Order Denying Leave to Participate as Amici Curiae	2	ER 234
2/28/20	53	Third Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction	2	ER 235-265
2/14/20	52	Order	2	ER 266
1/17/20	51	Order Granting Joint Motion to Vacate Mandatory Settlement Conference and Vacating Mandatory Settlement Conference	2	ER 267-268
1/15/20	50	Joint Motion to Vacate the Mandatory Settlement Conference	2	ER 269-284

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
11/18/19	48	Second Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction	2	ER 285-304
11/7/19	47	Joint Status Report	2	ER 305-308
10/29/19	46-4	Declaration of Nandu Ionescu in Support of Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction	2	ER 309-312
10/29/19	46-3	Declaration of William D. Shepard in Support of Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction	2	ER 313-320
10/29/19	46-2	Declaration of Edward Allen Johnson in Support of Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction	2	ER 321-323
10/29/19	46-1	Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction	2	ER 324-332
10/29/19	46	Supplemental Brief in Support of Plaintiffs'	2	333-344

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
		Motion for Preliminary Injunction		
10/23/19	45	Transcript of October 1, 2019 Status Conference	2	ER 345-391
9/27/19	42	Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction	2	ER 392-406
9/3/19	39	Transcript of Proceedings, August 19, 2019	3	ER 407-543
8/12/19	37-1	Declaration of Matthew D. Cubeiro in Support of Plaintiffs' Reply to Defendants' Opposition to Motion for Preliminary Injunction	3	ER 544-586
8/12/19	37	Plaintiffs' Reply to Defendant's Opposition to Motion for Preliminary Injunction	3	ER 587-598
8/9/19	36	Motion by Everytown for Gun Safety Support Fund for Leave to File Amicus Curiae Brief in Support of Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction	3	ER 599-602

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
8/9/20	35	Notion of Motion and Motion for Leave to Participate as Amici Curiae	3	ER 603-604
8/5/19	34-7	Request for Judicial Notice in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction; Declaration of Nelson R. Richards	3	ER 605-688
8/5/19	34-6	Exhibits 8-12 to Declaration of Morales	4	ER 689-724
8/5/19	34-5	Exhibit 7 (part 2) to Declaration of Morales	4	ER 725-760
8/5/19	34-4	Exhibit 7 (part 1) to Declaration of Morales	4	ER 761-821
8/5/19	34-3	Exhibit 6 to Declaration of Morales	4	ER 822-872
8/5/19	34-2	Exhibits 1-5 to Declaration of Morales	4	ER 873-943
8/5/19	34-1	Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction	4	ER 944-961

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
8/5/19	34	Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction	5	ER 962-994
7/22/19	33-1	Exhibits 11-34 to Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction [part 1]	5	ER 995-1258
7/22/19	33-1	Exhibits 11-34 to Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction [part 2]	6	ER 1259-1352
7/22/19	33	Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction	6	ER 1353-1487
7/22/19	32-16	Declaration of George Dodd	6	ER 1488-1492
7/22/19	32-15	Declaration of Christina McNab	6	ER 1493-1506
7/22/19	32-14	Declaration of Daniel Gray	6	ER 1507-1511
7/22/19	32-13	Declaration of Myra Lowder	6	ER 1508-1516

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
7/22/19	32-12	Declaration of Ethan Bartel	6	ER 1517-1521
7/22/19	32-11	Declaration of Travis Morgan	6	ER 1522-1526
7/22/19	32-10	Declaration of Chris Puehse	6	ER 1527-1531
7/22/19	32-9	Declaration of David Burwell	6	ER 1532-1536
7/22/19	32-8	Declaration of Bill Ortiz	6	ER 1537-1542
7/22/19	32-7	Declaration of Scott Lindemuth	6	ER 1543-1545
7/22/19	32-6	Declaration of Denise Welvang	6	ER 1546-1548
7/22/19	32-5	Declaration of Dan Wolgin	6	ER 1549-1552
7/22/19	32-4	Declaration of James Gilhousen	6	ER 1553-1556
7/22/19	32-3	Declaration of Richard Travis	7	ER 1557-1561
7/22/19	32-2	Declaration Sean A. Brady	7	ER 1562-1600
7/22/19	32-1	Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction	7	ER 1601-1634

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
7/22/19	32	Plaintiffs' Notice of Motion and Motion for Preliminary Injunction	7	ER 1635-1638
7/3/19	27	Order Granting Joint Motion to Amend Scheduling Order and Issuing Amended Scheduling Order	7	ER 1639-1644
10/31/18	17	Answer to the First Amended Complaint	7	ER 1645-1661
10/17/18	16	Order re: Defendant's Motion to Dismiss and Request for Judicial Notice	7	ER 1662-1673
7/18/18	11-2	Request for Judicial Notice in Support of Defendant Xavier Becerra's Motion to Dismiss the First Amended Complaint; Declaration of Nelson R. Richards	7	ER 1674-1714
7/18/18	11	Defendant Xavier Becerra's Notice of Motion and Motion to Dismiss the First Amended Complaint	7	ER 1715-1717
6/11/18	9	First Amended Complaint for Declaratory and Injunctive Relief	7	ER 1718-1750

File Date	District Court Docket Entry No.	Document	Vol. No.	Page Nos.
5/9/18	7	Order of Transfer Pursuant to Low Number Rule	7	ER 1751
4/26/18	3	Plaintiffs' Notice of Related Cases	7	ER 1752-1754
4/26/18	1	Complaint for Declaratory and Injunctive Relief	7	ER 1755-1790
		District Court Docket	7	ER 1790-1798

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE et al.,

Plaintiffs,

v.

**XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, et al.,**

Defendants.

3:18-cv-00802-BEN-JLB

**DEFENDANT'S MOTION TO
STAY ORDER GRANTING
PRELIMINARY INJUNCTION TO
ALLOW FOR INTERLOCUTORY
APPEAL (Fed. R. App. P. 8(a))**

Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: 4/27/2018

Defendant Xavier Becerra, in his official capacity as the California Attorney General, requests that this Court stay its order granting Plaintiffs' motion for preliminary injunction pending appeal of that decision. *See* Fed. R. App. P. 8(a). The Attorney General requests an immediate ruling on this motion. Immediate action on this motion is necessary because the Attorney General is informed and believes that ammunition vendors have already started selling ammunition without background checks, creating the near certainty that prohibited persons—convicted felons, violent misdemeanants, and others prohibited by law from possessing firearms and ammunition—will have easy access to ammunition. If the Court has not issued a ruling by 3:00 p.m. this afternoon, the Attorney General will consider the motion as having been denied and will consider seeking a stay from the Ninth Circuit shortly thereafter.

A request for a stay pending appeal is governed by four factors: (1) whether the movant is likely to succeed on the merits, (2) whether the movant will be irreparably injured absent a stay, (3) whether a stay will substantially harm the other parties, and (4) whether a stay serves the public interest. *Leiva-Perez v. Holder*, 640 F.3d 962, 963 (9th Cir. 2011). And where the balance of the equities tilts strongly in favor of a stay, the moving party need only show a “substantial case on the merits.” *Id.* at 970.

As to the merits, the Attorney General need not show that it is “more likely than not that” he will win on the merits. *Levia-Perez*, 640 F.3d at 967. Instead, he need only show a “reasonable probability” of prevailing; or that he has raised “serious legal questions.” *Id.* at 967-968 (quotation marks omitted). And the Court may grant a stay “even though its own approach may be contrary to movant’s view of the merits.” *Washington Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). For the reasons explained in his opposition to the motion for a preliminary injunction, the Attorney General has (at a minimum) made

both a “substantial case on the merits” and raised “serious legal questions” about the legal issues addressed in the order. *Leiva-Perez*, 640 F.3d at 966-67.

In any event, the balance of the equities tips overwhelmingly in favor of a stay. The preliminarily enjoined background check provisions, Cal. Pen. Code §§ 30352, 30370(a)-(d), have been in effect for almost 10 months, and have resulted in over 750 prohibited people from purchasing ammunition from licensed ammunition vendors. The preliminarily enjoined restrictions on direct shipping and importation of ammunition, Cal. Pen. Code §§ 30313(a)-(b), 30314(a), have been in effect over two years.

In addition, the order will almost certainly result in prohibited persons purchasing ammunition. By contrast, no plaintiff has said he or she is unable to purchase ammunition. The Court had plaintiffs’ motion for preliminary injunction under consideration for eight months. Temporarily staying the order for a short time longer will cause no significant harm to plaintiffs, who have been living with the status quo for 10 months (or over two years in the case of the restrictions on importation and direct shipping). And a stay will promote public safety by preventing prohibited persons from easily purchasing ammunition over the internet or from their local vendor.

Dated: April 24, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General

/s/ Nelson Richards
NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Defendant Xavier
Becerra, in his official capacity as
California Attorney General

CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra**

No. **3:18-cv-00802 BEN JLB**

I hereby certify that on April 24, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT'S MOTION TO STAY ORDER GRANTING PRELIMINARY
INJUNCTION TO ALLOW FOR INTERLOCUTORY 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 April 24, 2020, at Sacramento, California.

Tracie L. Campbell

Declarant

/s/ Tracie Campbell

Signature

SA2018101286
34023291.docx

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**XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, et al.,**

Defendants.

3:18-cv-00802-BEN-JLB

**FOURTH SUPPLEMENTAL
DECLARATION OF MAYRA G.
MORALES IN SUPPORT OF
DEFENDANT XAVIER
BECCERRA'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: 4/27/2018

FOURTH SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES

I, MAYRA G. MORALES, declare:

1. I am a Staff Services Manager III for the California Department of Justice, Bureau of Firearms (hereafter generally referred to together as the “Department”). I make this declaration of my own personal knowledge and experience and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. To date, I have prepared four declarations for submission to the Court:

- The August 5, 2019 Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 34-1;
- The September 27, 2019 Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 42;
- The November 18, 2019 Second Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 48; and,
- The February 28, 2020 Third Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 53.

3. This fourth supplemental declaration answers a question that the Court directed me to answer during the April 1, 2020, telephonic status conference. The Court asked me whether there is a process for a person to challenge a Department determination that he or she is prohibited from purchasing ammunition—for instance, whether a person who has a Standard Ammunition Eligibility Check (Standard Check) denied because he or she is prohibited can challenge the

Department's determination. *See* Apr. 1, 2020, Status Conference Tr. at 68:23-69:6.

4. In answer to the Court's question: Yes, there is a procedure that a person may use to contest a determination by the Department that he or she is prohibited. As part of my job duties, I am generally aware of the first steps in that procedure. My job duties do not, however, require me to participate in the procedure.

5. A person who has an ammunition eligibility check denied because Department records show that he or she is prohibited from possessing firearms and ammunition will be notified via letter. A true and correct copy of an example letter denying a Standard Check is attached to this declaration as **Exhibit A**. A true and correct copy of an example letter denying a Basic Ammunition Eligibility Check (Basic Check) is attached to this declaration as **Exhibit B**.

6. The letter received by Standard Check purchasers does not provide the specific reason the person is prohibited. *See* Ex. A. This is because Standard Checks rely on the Armed Prohibited Person System (APPS) to determine whether the purchaser is prohibited from possessing ammunition by way of checking the person's status in APPS, which is either prohibited or not prohibited.

7. The letter received by Basic Check purchasers provides that information. *See* Ex. B. That information is available because Basic Check denials involve manual review by a Department analyst that entails ascertaining the reason the person is prohibited.

8. Both letters inform the purchaser that "if you wish to challenge the Department's determination or the correctness of your criminal history record, please complete a Request for Live Scan Service form," and provide a form number and web address for where the form can be obtained. *See* Exs. A, B. A true and correct copy of the Request for Live Scan Service – Firearms Eligibility form (BOF 8016RR), which is the form that those who are denied in a Standard Check are directed to use, is attached to this declaration as **Exhibit C**. A true and correct copy

of the Request for Live Scan Service – Ammunition Eligibility form (BOF 8016ARR), which is the form that those who are denied in a Basic Check are directed to use, is attached to this declaration as **Exhibit D**.

9. Two different forms are used because denials under the two checks have slightly different scopes. As noted above, a person denied in a Standard Check is denied because the APPS system lists him or her as prohibited. This person could be denied because either state or federal records, or both, show him or her to be prohibited. The APPS system pulls from the same state databases as the Basic Check described in my earlier declarations to determine whether a person is prohibited. *See, e.g.*, Third Supp. Decl. ¶ 8, ECF No. 53. But it also relies on the federal National Criminal Background Check System (NICS), because APPS is used to identify prohibited people who are in possession of firearms. In this sense, the Standard Check relies on the same information relied on in a firearms background check. As a result, those who are denied on a Standard Check can use the same form (BOF 8016RR) to request information from their record as those who have been denied as prohibited from purchasing a firearm.

10. The Basic Check, on the other hand, does not rely on NICS. Thus, a person who is denied under a Basic Check is denied because state records (and not federal records) show him or her to be prohibited. The check relies on the four state databases described in my earlier declarations. *See, e.g.*, Third Supp. Decl. ¶ 8, ECF No. 53. The Department requests those denied under a Basic Check to use a different form (BOF 8016 ARR) to reflect the difference in the records that will be reviewed and supplied to the requestor.

11. Both forms are part of the same process.

12. A denied purchaser who desires that information can take his or her completed form to a Live Scan operator, who will fingerprint the denied purchaser and electronically submit the form to the Bureau of Criminal Information and Analysis (BCIA) Record Review Unit and thereafter the Bureau of Firearms. Once

1 the request is complete, the Department sends a copy of the findings to the denied
2 purchaser along with a copy of a challenge form to dispute all inaccurate
3 information. A true and correct copy of the challenge form, which is designated as
4 Claim of Alleged Inaccuracy or Incompleteness (BCIA 8706), is attached to this
5 declaration as **Exhibit E**.

6 13. The challenge form's subtitle reads "Examination of Records Pursuant to
7 Penal Code Section 11120-11127." Ex. E. and it informs the filer how to request
8 an administrative hearing. *Id.*

9 14. Beyond what I have described above, I do not have personal knowledge
10 of the process.

11
12 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
13 is true and correct.

14
15 Executed on: April 10, 2020

16
17 
18 MAYRA G. MORALES

Exhibit A

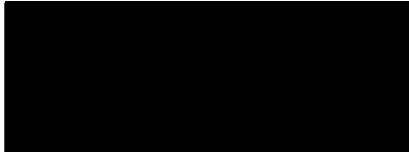
XAVIER BECERRA
ATTORNEY GENERAL

State of California
DEPARTMENT OF JUSTICE



BUREAU OF FIREARMS
P.O. BOX 820200
SACRAMENTO, CA 94203-0200
Telephone: (916) 210-2600
Fax: (916) 227-4808

April 07, 2020



RE: Purchaser Prohibited

Dear



You recently applied to purchase or transfer ammunition. This letter is to advise you that the purchase has been denied because the Department of Justice (the Department) records indicate you are not eligible to own or possess ammunition. If you wish to challenge the accuracy of the Department's determination or the completeness of your criminal history record, please complete a Request for Live Scan Service form (BOF 8016RR) located on the Bureau of Firearms web page at <https://oag.ca.gov/firearms>.

Sincerely,

ARMED AND PROHIBITED PERSONS SECTION
Bureau of Firearms

For XAVIER BECERRA
ATTORNEY GENERAL

Exhibit B

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



BUREAU OF FIREARMS
P.O. BOX 820200
SACRAMENTO, CA 94203-0200
Telephone: (916) 227-7527
Fax: (916) 227-3744

March 25, 2020

RE: Ammunition Denial

Dear [REDACTED]:

You recently applied to purchase or transfer ammunition. When a person applies to purchase or transfer ammunition in California, the California Department of Justice (the Department) is required by state laws to examine its records to determine whether the purchaser is eligible under state law to purchase and possess ammunition. Your recent ammunition purchase application is being denied because the Department's review of state records matching your identifying information revealed the following information:

Felon: Any person who has been convicted of a felony under the laws of the United States, of the State of California, or of any other state, government, or country.

This determination was based upon information you provided in your application to purchase ammunition, such as your name, date of birth, driver license number and physical description, but has not been confirmed with fingerprint comparison. It is possible that the criminal record may not be yours and may belong to another individual whose name and identifying information is similar to yours.

If you wish to challenge the accuracy of the Department's determination or the completeness of your criminal history record, please complete a Request for Live Scan Service form (BCIA/BOF 8016ARR) located on the Bureau of Firearms web page at <http://oag.ca.gov/firearms>.

FIREARMS CLEARANCE SECTION
Bureau of Firearms

For **XAVIER BECERRA**
Attorney General

Exhibit C



REQUEST FOR LIVE SCAN SERVICE

Applicant Submission

AB165

ORI (Code assigned by DOJ)

FIREARMS RECORD REVIEW

Authorized Applicant Type

FIREARMS ELIGIBILITY

Type of License/Certification/Permit OR Working Title (Maximum 30 characters - if assigned by DOJ, use exact title assigned)

Contributing Agency Information:

CALIFORNIA DEPARTMENT OF JUSTICE - RECORD REVIEW UNIT

Agency Authorized to Receive Criminal Record Information

RECORD REVIEW UNIT

Contact Name (mandatory for all school submissions)

P.O. BOX 903417

Street Address or P.O. Box

SACRAMENTO

City

CA 94203-4170

State ZIP Code

Applicant Information:

Last Name

First Name

Middle Initial

Suffix

Other Name
(AKA or Alias) Last

First

Suffix

Date of Birth

Sex ☐ Male ☐ Female

Driver's License Number

Height

Weight

Eye Color

Hair Color

Billing

Number APPLICANT TO PAY FEES

(Agency Billing Number)

Misc.

Number

(Other Identification Number)

Place of Birth (State or Country)

Social Security Number

Home

Address Street Address or P.O. Box

City

State

ZIP Code

Your Number:

OCA Number (Agency Identifying Number)

Level of Service: ☒ DOJ

If re-submission, list original ATI number:
(Must provide proof of rejection)

Original ATI Number

Designee (Optional for individual designated by applicant pursuant to Penal Code section 11124):

Designee Name

Telephone Number (optional)

Street Address or P.O. Box

City

State

ZIP Code

Live Scan Transaction Completed By:

Name of Operator

Date

Transmitting Agency

LSID

ATI Number

Amount Collected/Billed



REQUEST FOR LIVE SCAN SERVICE (Instructions)

California Penal Code sections 11120 through 11127, and 30105 allows you to obtain a copy of your record, if any, contained in the files of the California Department of Justice and refute any erroneous or inaccurate information contained therein.

Beginning with live scan transactions submitted after April 6, 2006, the Department of Justice (DOJ) will only mail responses to you unless you complete the Designee portion on page 1 pursuant to Penal Code section 11124.

You may use the information you receive to answer questions regarding past criminal history, firearms eligibility, or to complete an application or questionnaire. However, no person or agency may require you to obtain a copy of your record or to furnish the information for any purpose, including immigration, visa, employment, licensing, or certification. (See California Penal Code sections 11125 and 30105.)

INSTRUCTIONS FOR COMPLETING THE "REQUEST FOR LIVESCAN SERVICE"

CATEGORY	INSTRUCTIONS	COMMENTS
Authorized Applicant Type:	Verify "Firearms Record Review" appears.	This is a mandatory field and must be completed.
Name of Applicant & Personal Descriptors:	Enter your full name, any known alias, date of birth, sex, height, weight, eye & hair color, place of birth, social security number and California driver's license number.	Name, date of birth, and sex are mandatory fields and must be provided. All others are optional.
Applicant Address:	Enter your home address.	This is a mandatory field and must be completed.
Daytime Telephone Number:	Enter the telephone number, including area code, where you can be reached between 8 a.m. and 5 p.m.	A telephone number is useful in helping to resolve problems which could result in a delay in processing your request.

AFTER COMPLETING THE "REQUEST FOR LIVE SCAN SERVICE" FORM

- Check your local telephone directory or contact your local police department or sheriff's office for a business or local law enforcement agency that offers "Live Scan" fingerprinting services, the fee charged by the business/agency for the Live Scan service, and the types of payment accepted. You can also view a current listing of Live Scan sites offering electronic fingerprinting services on the Attorney General's website at: <https://oag.ca.gov/fingerprints/locations>
- Go to the Live Scan business/agency of your choice to have your fingerprints taken and pay all applicable fees, including the fingerprint rolling fee. Please ensure that any private fingerprinting service you select is certified by the California Department of Justice.
- If you have questions about completing the "Request for Live Scan Service" form (BOF 8016RR), please contact the Record Review Unit at (916) 227-7527.



REQUEST FOR LIVE SCAN SERVICE

Privacy Notice

As Required by Civil Code § 1798.17



Collection and Use of Personal Information: The Division of Law Enforcement, Bureau of Firearms in the Department of Justice collects the information on this request pursuant to Penal Code sections 11122 and 11123. The Bureau of Firearms uses this information to process a person's request to obtain a copy of their criminal history record. In addition, any personal information collected by state agencies is subject to the limitations in the Information Practices Act and state policy. The Department of Justice's general privacy policy is available at <https://oag.ca.gov/privacy-policy>.

Providing Personal Information: All personal information on this request is mandatory. Failure to provide the mandatory personal information will result in your request not being processed.

Access to Your Information: You may review the records maintained by the Division of Law Enforcement, Bureau of Firearms in the Department of Justice that contain your personal information, as permitted by the Information Practices Act. See below for contact information.

Possible Disclosure of Personal Information: In order to process a person's request to obtain a copy of their criminal history record, we may need to share the information you provide us with any Bureau of Firearms representative or any other person designated by the Attorney General upon request. The information you provide may also be disclosed in the following circumstances:

- With other persons or agencies when necessary to perform their legal duties, and their use of information is compatible and complies with state law, such as for investigations, licensing, certification, or regulatory purposes;
- To another government agency as required by state or federal law.

Contact Information: For questions about this notice or access to your records, you may contact the Staff Services Analyst in the Customer Support Center at (916) 227-7527, via email at firearms.bureau@doj.ca.gov, or by mail at P.O. Box 903417, Sacramento, CA 94203-4170.

Exhibit D



REQUEST FOR LIVE SCAN SERVICE

Applicant Submission

AB165

ORI (Code assigned by DOJ)

AMMUNITION RECORD REVIEW

Authorized Applicant Type

AMMUNITION ELIGIBILITY

Type of License/Certification/Permit OR Working Title (Maximum 30 characters - if assigned by DOJ, use exact title assigned)

Contributing Agency Information:

CALIFORNIA DEPARTMENT OF JUSTICE - RECORD REVIEW UNIT

Agency Authorized to Receive Criminal Record Information

RECORD REVIEW UNIT

Contact Name (mandatory for all school submissions)

P.O. BOX 903417

Street Address or P.O. Box

SACRAMENTO

City

CA 94203-4170

State ZIP Code

Applicant Information:

Last Name

First Name

Middle Initial

Suffix

Other Name
(AKA or Alias) Last

First

Suffix

Date of Birth

Sex ☐ Male ☐ Female

Driver's License Number

Height

Weight

Eye Color

Hair Color

Billing

Number **APPLICANT TO PAY FEES**

(Agency Billing Number)

Place of Birth (State or Country)

Social Security Number

Misc.

Number

(Other Identification Number)

Home

Address Street Address or P.O. Box

City

State

ZIP Code

Your Number:

OCA Number (Agency Identifying Number)

Level of Service: ☒ DOJ

If re-submission, list original ATI number:
(Must provide proof of rejection)

Original ATI Number

Designee (Optional for individual designated by applicant pursuant to Penal Code section 11124):

Designee Name

Telephone Number (optional)

Street Address or P.O. Box

City

State

ZIP Code

Live Scan Transaction Completed By:

Name of Operator

Date

Transmitting Agency

LSID

ATI Number

Amount Collected/Billed



REQUEST FOR LIVE SCAN SERVICE

(Instructions)

California Penal Code sections 11120 through 11127, and 30105 allows you to obtain a copy of your record, if any, contained in the files of the California Department of Justice and refute any erroneous or inaccurate information contained therein.

Beginning with live scan transactions submitted after April 6, 2006, the Department of Justice (DOJ) will only mail responses to you unless you complete the Designee portion on page 1 pursuant to Penal Code section 11124.

You may use the information you receive to answer questions regarding past criminal history, ammunition eligibility, or to complete an application or questionnaire. However, no person or agency may require you to obtain a copy of your record or to furnish the information for any purpose, including immigration, visa, employment, licensing, or certification. (See California Penal Code sections 11125 and 30105.)

INSTRUCTIONS FOR COMPLETING THE "REQUEST FOR LIVESCAN SERVICE"

CATEGORY	INSTRUCTIONS	COMMENTS
Authorized Applicant Type:	Verify "Ammunition Record Review" appears.	This is a mandatory field and must be completed.
Name of Applicant & Personal Descriptors:	Enter your full name, any known alias, date of birth, sex, height, weight, eye & hair color, place of birth, social security number and California driver's license number.	Name, date of birth, and sex are mandatory fields and must be provided. All others are optional.
Applicant Address:	Enter your home address.	This is a mandatory field and must be completed.
Daytime Telephone Number:	Enter the telephone number, including area code, where you can be reached between 8 a.m. and 5 p.m.	A telephone number is useful in helping to resolve problems which could result in a delay in processing your request.

AFTER COMPLETING THE "REQUEST FOR LIVE SCAN SERVICE" FORM

- Check your local telephone directory or contact your local police department or sheriff's office for a business or local law enforcement agency that offers "Live Scan" fingerprinting services, the fee charged by the business/agency for the Live Scan service, and the types of payment accepted. You can also view a current listing of Live Scan sites offering electronic fingerprinting services on the Attorney General's website at: <https://oag.ca.gov/fingerprints/locations>
- Go to the Live Scan business/agency of your choice to have your fingerprints taken and pay all applicable fees, including the fingerprint rolling fee. Please ensure that any private fingerprinting service you select is certified by the California Department of Justice.
- If you have questions about completing the "Request for Live Scan Service" form (BOF 8016RR AMMUNITION), please contact the Record Review Unit at (916) 227-7527.



REQUEST FOR LIVE SCAN SERVICE



Privacy Notice

As Required by Civil Code § 1798.17

Collection and Use of Personal Information: The Division of Law Enforcement, Bureau of Firearms in the Department of Justice collects the information on this request pursuant to Penal Code sections 11122 and 11123. The Bureau of Firearms uses this information to process a person's request to obtain a copy of their criminal history record. In addition, any personal information collected by state agencies is subject to the limitations in the Information Practices Act and state policy. The Department of Justice's general privacy policy is available at <https://oag.ca.gov/privacy-policy>.

Providing Personal Information: All personal information on this request is mandatory. Failure to provide the mandatory personal information will result in your request not being processed.

Access to Your Information: You may review the records maintained by the Division of Law Enforcement, Bureau of Firearms in the Department of Justice that contain your personal information, as permitted by the Information Practices Act. See below for contact information.

Possible Disclosure of Personal Information: In order to process a person's request to obtain a copy of their criminal history record, we may need to share the information you provide us with any Bureau of Firearms representative or any other person designated by the Attorney General upon request. The information you provide may also be disclosed in the following circumstances:

- With other persons or agencies when necessary to perform their legal duties, and their use of information is compatible and complies with state law, such as for investigations, licensing, certification, or regulatory purposes;
- To another government agency as required by state or federal law.

Contact Information: For questions about this notice or access to your records, you may contact the Staff Services Analyst in the Customer Support Center at (916) 227-7527, via email at firearms.bureau@doj.ca.gov, or by mail at P.O. Box 903417, Sacramento, CA 94203-4170.

Exhibit E



STATE OF CALIFORNIA
BCIA 8706
(Rev. 10/2018)

DEPARTMENT OF JUSTICE
PAGE 1 of 2

CLAIM OF ALLEGED INACCURACY OR INCOMPLETENESS

(Examination of Records Pursuant to Penal Code Sections 11120–11127)

To challenge the accuracy and/or completeness of your record, you **must** first complete a record review. For information on requesting a copy of your California state summary criminal history record, go to <https://oag.ca.gov/fingerprints/record-review>. Please be advised, the Bureau of Criminal Information and Analysis (BCIA) must complete its research regarding your record challenge as requested by submission of this claim form. If you wish to request an administrative hearing, please contact the Record Quality Services Program at RecordReview@doj.ca.gov.

Applicant Information (Please print or type all information requested on this form. Failure to do so may result in processing delays and/or return of the claim form.)

LAST NAME:		FIRST NAME:		MIDDLE INITIAL:
ADDRESS:	APT/UNIT:	CITY:	STATE:	ZIP CODE:
E-MAIL ADDRESS:		PHONE NUMBER:	CII NUMBER (SID):	

Reason for Dispute (Check the box that is applicable to your dispute and explain the reason for your claim in the spaces provided below. If the reason is not listed, check "Other." If you have more than two disputes, please use another page.)

Dispute One

DATE OF ARREST: _____

- | | | | |
|--|--|--|--------------------------------|
| <input type="checkbox"/> Incorrect Disposition | <input type="checkbox"/> Offense Dismissed Per 1203.4 PC | <input type="checkbox"/> Sealed Entry | <input type="checkbox"/> Other |
| <input type="checkbox"/> Missing Disposition | <input type="checkbox"/> Offense Reduced to Misdemeanor Per 17(B) PC | <input type="checkbox"/> Wrong Conviction Type | |
| <input type="checkbox"/> Not Arrested | <input type="checkbox"/> Remove Entry | <input type="checkbox"/> Wrong Personal Descriptor Information | |

Brief Explanation of Claim: _____

Dispute Two

DATE OF ARREST: _____

- | | | | |
|--|--|--|--------------------------------|
| <input type="checkbox"/> Incorrect Disposition | <input type="checkbox"/> Offense Dismissed Per 1203.4 PC | <input type="checkbox"/> Sealed Entry | <input type="checkbox"/> Other |
| <input type="checkbox"/> Missing Disposition | <input type="checkbox"/> Offense Reduced to Misdemeanor Per 17(B) PC | <input type="checkbox"/> Wrong Conviction Type | |
| <input type="checkbox"/> Not Arrested | <input type="checkbox"/> Remove Entry | <input type="checkbox"/> Wrong Personal Descriptor Information | |

Brief Explanation of Claim: _____

Declaration (The claim form must be signed and dated by the applicant. If you elect to designate a person or attorney to correspond on your behalf, please provide their full name in the space provided below.)

By signing below, I declare that I have examined a copy of my California State Summary Criminal History Record as contained in the files of the Department of Justice, Bureau of Criminal Information and Analysis, and wish to take exception to its accuracy and/or completeness.

I declare under penalty of perjury that the information I have provided on this form is true and correct to the best of my ability.

Signature of Applicant

Date

I hereby administer to the following person to correspond with the Department of Justice on my behalf and authorize the person to receive a copy of the Department's findings concerning this matter: _____

Name of Designee/Attorney (if applicable)

PLEASE READ AND FOLLOW THESE IMPORTANT PROCESSING INSTRUCTIONS

- Failure to complete and sign the form correctly may result in processing delays or the return of the claim form.
- Attach copies of any official document or court orders that would verify your claim. You may attach additional sheets if necessary.
- If an attorney is submitting the claim on your behalf it must be signed and dated by you the applicant.
- Mail the completed form to the Record Quality Services Program to the address below:

**Bureau of Criminal Information and Analysis
Record Quality Services Program
P.O. Box 903417
Sacramento, CA 94203-4170**



STATE OF CALIFORNIA
BCIA 8706
(Rev. 10/2018)

DEPARTMENT OF JUSTICE
PAGE 2 of 2

CLAIM OF ALLEGED INACCURACY OR INCOMPLETENESS **(Examination of Records Pursuant to Penal Code Sections 11120–11127)**

Privacy Notice

As Required by Civil Code § 1798.17

Collection and Use of Personal Information. The California Justice Information Services (CJIS) Division in the Department of Justice (DOJ) collects the information requested on this form as authorized by Penal Code Sections 11120–11127 and other various state statutes and regulations. The CJIS Division uses this information to process requests regarding disputes and exceptions taken to the accuracy and completeness of criminal records. In addition, any personal information collected by state agencies is subject to the limitations in the Information Practices Act and state policy. The DOJ's general privacy policy is available at <http://oag.ca.gov/privacy-policy>.

Providing Personal Information. All the personal information requested in the form must be provided. Failure to provide all the necessary information will result in delays and/or the rejection of your request.

Access to Your Information. You may review the records maintained by the CJIS Division in the DOJ that contain your personal information, as permitted by the Information Practices Act. See below for contact information.

Possible Disclosure of Personal Information. In order to process applications pertaining to disputes and exceptions taken to the accuracy and/or completeness regarding criminal arrest records, we may need to share the information you give us with authorized applicant agencies.

The information you provide may also be disclosed in the following circumstances:

- With other persons or agencies where necessary to perform their legal duties, and their use of your information is compatible and complies with state law, such as for investigations or for licensing, certification, or regulatory purposes;
- To another government agency as required by state or federal law.

Contact Information. For questions about this form or access to your records, you may contact the DOJ's Keeper of Records at (916) 210-3310 or by e-mail at keeperofrecords@doj.ca.gov or by mail at:

Department of Justice
Bureau of Criminal Information & Analysis
Keeper of Records
P.O. Box 903417
Sacramento, CA 94203-4170

CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra**

No. **3:18-cv-00802 BEN JLB**

I hereby certify that on April 10, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**FOURTH SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES IN
SUPPORT OF DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

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 April 10, 2020, at Sacramento, California.

Tracie L. Campbell

Declarant

/s/ *Tracie Campbell*

Signature

XAVIER BECERRA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General
NELSON R. RICHARDS
Deputy Attorney General
State Bar No. 246996
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7867
Fax: (916) 324-8835
E-mail: Nelson.Richards@doj.ca.gov
*Attorneys for Defendant Xavier Becerra, in
his official capacity as California Attorney
General*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE et al.,

Plaintiffs,

v.

**XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, et al.,**

Defendants.

3:18-cv-00802-BEN-JLB

**DEFENDANT'S RESPONSE TO
COURT'S INQUIRY AT APRIL 1,
2020, STATUS CONFERENCE**

Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: 4/27/2018

Defendant Xavier Becerra, in his official capacity as the California Attorney General, submits this brief to respond to the Court's question raised during the April 1, 2020 status conference regarding the relationship between Proposition 63 and Senate Bill 1235 (2016 Cal. Stat., ch. 55). The Court asked Defendant to provide "authority . . . on the State being able to preemptively amend an initiative that" has been presented to the people. *See* Apr. 1, 2020, Status Conference Tr. at 68:16-22; *see also id.* 25:19-22. As set forth in more detail below, the Legislature acted consistent with the California Constitution when it enacted SB 1235. Even so, this Court should refrain from considering the issue both because it was raised for the first time at the recent status conference and because it was not raised in the First Amended Complaint or Plaintiffs' motion for preliminary injunction.

I. SB 1235 WAS A VALID LEGISLATIVE ENACTMENT

During the April 1, 2020 status conference the Court suggested that SB 1235 being enacted before the voters adopted Prop. 63 may constitute a basis for preliminarily enjoining the law. *See* Apr. 1, 2020, Status Conference Tr. at 28:12-21. SB 1235 raises no such concern.

As a threshold matter, California law affords acts of the Legislature a strong presumption of constitutionality. *See, e.g., Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243, 1253 (1995) (noting "the general rule that a strong presumption of constitutionality supports the Legislature's acts"); *Methodist Hosp. of Sacramento v. Saylor*, 5 Cal.3d 685, 691 (1971) ("If there is any doubt as to the Legislature's power to act in a given case, the doubt should be resolved in favor of Legislative action."). "[U]nlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution." *Howard Jarvis Taxpayers Ass'n v. Padilla*, 62 Cal.4th 486, 498 (2016) (quotation marks omitted). Defendant

knows of no authority suggesting that the Legislature did not have the power to amend Prop. 63.

In California, “[t]he legislative power . . . is vested in the . . . Legislature . . . , but the people reserve to themselves the powers of initiative and referendum.” Cal. Const. art. IV, § 1. “The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” *Id.* art. II, § 8. Put another way, “the reserved power to enact statutes by initiative is a legislative power, one that would otherwise reside in the Legislature.” *Legislature v. Deukmejian*, 34 Cal.3d 658, 673 (1983). Prop. 63 was an initiative statute. Ballot Pamp., Gen. Elec. (Nov. 8, 2016), at 84.¹

Article II, section 10, of the California Constitution permits the Legislature to amend or repeal initiative statutes in one of two ways. Cal. Const. art. II, § 10(c). It may either enact another statute that becomes effective only when approved by the voters or it may amend or repeal the initiative statute if the initiative statute permits changes. *See id.*

Deciding whether a statute enacted by the Legislature impermissibly amends an initiative statute involves two steps. *See People v. Superior Court (Pearson)*, 48 Cal.4th 564, 571 (2010). First, courts ask whether the Legislature’s statute amends the initiative statute, that is, whether it is “designed to change an existing initiative statute by adding or taking from it some particular provision.” *People v. Cooper*, 27 Cal.4th 38, 44 (2002). Here, by its terms, SB 1235 amended Prop. 63. 2016 Cal. Stat., ch. 55, § 19(b) (classifying provisions in the law as amendments to Prop. 63).²

¹ In its October 17, 2018 order granting in part and denying in part Defendant’s motion to dismiss, this Court took judicial notice of Prop. 63 ballot materials. *Rhode v. Becerra*, 342 F. Supp. 3d 1010, 1012 (S.D. Cal. 2018). This memorandum cites to those materials, which are in the record as Exhibit 1 to the Request for Judicial Notice in Support of Defendant Xavier Becerra’s Motion to Dismiss the First Amended Complaint, ECF No. 11-2.

² Section 15 is an uncodified provision of SB 1235. A complete copy of

Second, if the Legislature's statute amends the initiative statute, courts look to whether the initiative statute permits amendment, and if so, whether the Legislature's statute complies with the initiative statute's amendment provisions. *See, e.g., People v. Superior Court (K.L.)*, 36 Cal.App.5th 529, 535 (2019). In conducting that analysis, courts "start with the presumption that the Legislature acted within its authority and uphold the validity of the legislative amendment if, by any reasonable construction, it can be said that the statute furthers the purposes of the initiative." *Id.* (quotation marks and brackets omitted).

Prop. 63 provided that the "provisions of this measure may be amended by a vote of 55 percent of the members of each house . . . so long as such amendments are consistent with and further the intent of this Act." Prop. 63 § 13. SB 1235 received 46 aye votes and 30 no votes, with 4 abstaining, or 57.5%, in the Assembly, and 23 aye votes and 14 no votes with 3 abstaining, also 57.5%, in the Senate.³

SB 1235 also contained a legislative finding that the intent of Prop. 63 "is to safeguard the ability of law-abiding, responsible Californians to own and use firearms for lawful means while requiring background checks for ammunition purchases in the manner required for firearm purchases so that neither firearms nor ammunition are getting into the hands of dangerous individuals." 2016 Cal. Stat., ch. 55, § 19(b). Recognizing that intent, the Legislature found its amendments to Prop. 63 were "consistent with and further" that intent because the "amendments ensure that only law-abiding, responsible Californians who appear in the Automated Firearms System are able to purchase ammunition for their legally owned firearms while violent felons and the dangerously mentally ill who appear in the Armed Prohibited Persons System are not." *Id.*

SB 1235 is available on commercial legal databases, such as Westlaw, as well as the California Legislative Information website at <https://leginfo.legislature.ca.gov/>.

³ The Legislature's voting history on SB 1235 is available on the California Legislative Information website at <https://leginfo.legislature.ca.gov/>.

These Legislative findings correctly state Prop. 63’s intent. When the voters enacted Prop. 63, they decided that the law should “require background checks for ammunition sales just like gun sales,” Prop. 63 § 2.7, to keep ammunition out of the hands of dangerous people who are prohibited under the law from possessing guns or ammunition, Prop. 63 §§ 3.2-3.3. Not only was SB 1235 designed to further that purpose, but the law, as implemented, is realizing that purpose. As the California Department of Justice (Department) has shown, from July 2019 through January 2020, the background check system stopped over 750 prohibited persons from purchasing ammunition—and that number reflects only those who were willing to try in the face of the background check process. *See* Third Supp. Decl. of M. Morales in Supp. of Def.’s Opp’n to Pls.’ Mot. for Prelim. Inj. ¶ 56 & Tables 1.1, 2.1, ECF No. 53.

SB 1235’s primary change to Prop. 63 relates to Penal Code section 30370. Under Prop. 63, Penal Code section 30370 authorized the Department to issue “ammunition purchase authorizations” that would last four years, subject to revocation, if the holder became prohibited. Prop. 63 § 8.15. SB 1235 repealed that provision and added a new Penal Code section 30370 that established the current, point-of-sale background check process. *See* 2016 Cal. Stat., ch. 55, §§ 15, 16. No one has argued that this change undermined Prop. 63’s purpose of requiring background checks for ammunition purchases and keeping ammunition out of the hands of prohibited people. Nor has anyone argued that SB 1235 is invalid because it did not otherwise comply with article II, section 10(c), or any other limitation on the Legislature’s plenary power in the California Constitution. The Department of Justice was required by the California Constitution to implement the law as amended. *See* Cal. Const. art. III, § 3.5.

II. THIS COURT SHOULD REFRAIN FROM ADDRESSING WHETHER SB 1235 VALIDLY AMENDED PROP. 63

Notwithstanding SB 1235's sound footing, this Court should refrain from addressing whether the Legislature validly enacted the law under the California Constitution for two reasons.

First, Plaintiffs have not raised the issue in either the First Amended Complaint or their motion for preliminary injunction. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1985) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). Premising an injunction on SB 1235 invalidly amending Prop. 63, when Plaintiffs have not advanced that theory, implicates a number of due process concerns, including fair notice and opportunity for Defendant to be heard on the issue. (For the reasons set forth above, it is not clear what would support this theory of invalidity, making a response very difficult to formulate.)

Second, to the extent the Court questions SB 1235's validity under the California Constitution, it should decline to exercise supplemental jurisdiction over that question because—to the extent the Court disagrees with the analysis above—that presents a novel and complex issue of state law. *See* 28 U.S.C. § 1367(c)(1); *see, e.g., Wilson v. PFS, LLC*, 493 F. Supp. 2d 1122, 1126 (S.D. Cal. 2007) (granting defendant's rule 12(b)(1) motion to dismiss state law claims where those claims presented "novel and complex matters of state law that are better left to the California courts for interpretation and decision" (quotation marks omitted)). That no party has raised the issue would also present the sort of exceptional circumstances that counsel against exercising supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(4).

Dated: April 10, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General

/s/ Nelson Richards
NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Defendant Xavier
Becerra, in his official capacity as
California Attorney General

CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra**

No. **3:18-cv-00802 BEN JLB**

I hereby certify that on April 10, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S RESPONSE TO COURT'S INQUIRY AT APRIL 1, 2020, STATUS CONFERENCE

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 April 10, 2020, at Sacramento, California.

Tracie L. Campbell

Declarant

/s/ Tracie Campbell

Signature

SA2018101286
33984607.docx

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Before The Honorable ROGER T. BENITEZ, District Court Judge

KIM RHODE, et al.,)
)
Plaintiff,) CASE NO.
VS.) 3:18-cv-802-BEN-JLB
)
XAVIER BECERRA, et al.,)
)
Defendants.)
_____)

San Diego, California
Wednesday, April 1, 2020

APPEARANCES:

For Plaintiffs: MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, California 90802
BY: SEAN BRADY, ESQ.

For Defendants: CALIFORNIA ATTORNEY GENERAL'S OFFICE
2550 Mariposa Mall, Room 5090
Fresno, California 93721
BY: NELSON RICHARDS, ESQ.

Reported by: Ellen L. Simone, RMR, CRR, CSR No. 14261
Official Court Reporter

1 SAN DIEGO, CALIFORNIA; APRIL 1, 2020; 1:18 P.M.

2 -oOo-

3 THE COURT: Good afternoon. This is Judge Benitez.
4 Please identify yourselves for the record.

5 MR. BRADY: Good afternoon, Judge Benitez. This is --
6 Your Honor, this is Sean Brady on behalf of the plaintiffs.

7 MR. RICHARDS: Good afternoon, Your Honor. Nelson
8 Richards on behalf of the defendants, and I have here with me
9 Mayra Morales.

10 THE COURT: Well, welcome to all of you.

11 Just some ground rules. As you speak, every time that
12 you speak, please identify yourselves so -- since we're not
13 present, my court reporter is also not present, she is on the
14 phone, and so we're trying to be as compliant with government
15 nuisance orders as we possibly can be to keep people apart from
16 each other, but that means that we have to take some extra
17 precautions, which means that you have to identify yourself
18 every time that you speak. Okay? Please don't forget.

19 Let me start out by thanking you for being at this
20 conference on such short notice. I appreciate it. But I am
21 trying to get this order out, and I think there are some things
22 that are important that I just have not been able to get
23 through clear enough in my head, and so I thought we'd try and
24 get this, if we could, do it telephonically, anyway.

25 The second thing I want to do is I want to thank the

1 State for being responsive and producing information that I
2 have requested so far, which has certainly helped, to some
3 extent, crystalize some of the issues. Okay? So I thank you
4 all for being here and I thank you for providing me the
5 information.

6 Now, I have some questions, and I want to make sure
7 that I have my numbers straight. So this may go to -- is it
8 Ms. Gonzalez?

9 MS. MORALES: Yes. Mayra Morales.

10 THE COURT: Morales. I'm sorry. Yeah, okay.

11 So I was going through the numbers, and I want to make
12 sure I have these right. If I understand correctly, by the end
13 of January, there had been 616,257 standard applications; is
14 that correct?

15 MS. MORALES: Your Honor, can you please refer me to
16 the page that you are looking at?

17 THE COURT: No, I can't. I'm sorry. I --

18 MS. MORALES: Yes, that is -- if you're referring to
19 AFS checks process, yes, 616,257.

20 THE COURT: Right. And that's -- that's what -- I get
21 a little confused, because sometimes it's referred to as the
22 standard, sometimes it's referred to as the AFS, and so for
23 purposes of this conference, how about if we all agree that we
24 will call that the standard background check. Agreed?

25 MS. MORALES: Agreed.

1 THE COURT: Okay, good.

2 Now, if I understand it correctly, there are 101,047
3 rejections; is that correct?

4 MS. MORALES: That is correct, yes, due to no match
5 with AFS records.

6 THE COURT: Okay. Not matched with AFS records,
7 meaning -- and what does that mean? Explain that to me.

8 MS. MORALES: That the individual submitted a standard
9 check, and they did not match -- they were rejected because
10 they did not match a record in the Automated Firearms System.
11 One of the four criteria did not match, or any of them did not
12 match; their criteria being name, date of birth, ID, or main
13 address.

14 THE COURT: Okay. Now, there were 188 persons who
15 were rejected as being prohibited persons; is that correct?

16 MS. MORALES: They were denied because they were
17 prohibited persons, yes, that is correct.

18 THE COURT: All right. Now, out of that 188 people,
19 how many have you been verified to, in fact, be prohibited
20 persons?

21 MS. MORALES: Your Honor, I do not have that number
22 readily available for you.

23 THE COURT: Can you tell me, though, the 188 people,
24 why they were deemed to be prohibited persons?

25 MS. MORALES: No, Your Honor, I cannot.

1 THE COURT: In broad categories? I mean, I'm not
2 talking about tell me all 188, but can you tell me in broad
3 categories what those categories were?

4 MS. MORALES: No, your Honor, I cannot. I would have
5 to get that information.

6 THE COURT: But you do have that information
7 available --

8 MS. MORALES: Yes.

9 THE COURT: -- is that correct?

10 MS. MORALES: Yes. It is possible for me to get that
11 information.

12 THE COURT: Okay. So we have 188 people that were
13 failed to be prohibited persons, but as of right now, I don't
14 know why they were prohibited persons, in other words, I don't
15 know if they were persons unlawfully present in the United
16 States, or if they were felons, or people that had been found
17 to be mentally ill, et cetera. But you do have that
18 information at the State level, correct?

19 MS. MORALES: Correct.

20 THE COURT: Okay. I guess you're not really
21 identifying yourself each time you speak, but Ms. Morales,
22 we're going to give you a pass since I think we can figure out
23 that you're not one of the three male voices on this recording.

24 So Mr. Richards, Mr. Brady, and myself -- well,
25 Mr. Brady and Mr. Richards will identify themselves each time

1 they speak. Ms. Morales, we'll give you a pass.

2 And I apologize for that. Okay.

3 MS. MORALES: No, I apologize. Thank you.

4 THE COURT: No, that's okay. Don't worry about that.

5 All right.

6 Now, I wanted to ask, is there an appeal process if --
7 if someone applies for an AFS, is there an appeal process that
8 one can go through in order to be determined to not be a
9 prohibited person?

10 Mr. Richards, do you know?

11 MR. RICHARDS: Your Honor, this is Nelson Richards.

12 I guess, I'm not sure what you mean by "appeal
13 process". Do you mean if they have an ammunition -- the
14 standard eligibility ammunition check rejected, is there an
15 internal process within the Bureau, a process that they can
16 resort to to challenge that determination?

17 THE COURT: Yes.

18 MS. MORALES: Yes. This is Mayra speaking. Yes, I
19 believe there is.

20 THE COURT: And what is that process? Can you
21 summarize it for me?

22 MS. MORALES: Unfortunately, I don't know that process
23 well enough to be able to summarize it for you.

24 THE COURT: Can you tell me where I would go to look
25 to see what the process would be?

1 MS. MORALES: Not specifically, but I believe it is on
2 our website.

3 THE COURT: Is that the AFS website?

4 MS. MORALES: The Bureau of Firearms website.

5 THE COURT: Okay. So please forgive me. You folks
6 are much more familiar with this than I am, so I'm trying to
7 work my way through this.

8 So the way I understand this, the standard background
9 check, if I go into an ammunition vendor and I tell them I want
10 to buy a box of ammo, they will then run my information through
11 the AFS check, and then they will say, "You've been approved,"
12 or, "You've been rejected."

13 Now, I know one of the reasons for rejection is that I
14 may not be in the AFS system, right?

15 MS. MORALES: Correct.

16 THE COURT: Okay. And that may be because I bought a
17 gun a long, long time ago, perhaps a shotgun or a rifle, or
18 could be that I inherited a gun sometime, or I purchased the
19 gun through a private sale in some other state, or I lived in
20 some other state and I moved into the State of California.
21 Those are all reasons why I might not be in the AFS system; is
22 that a fair statement?

23 MS. MORALES: Yes.

24 THE COURT: All right. So the way I understand it, if
25 I fit one of those categories that I just mentioned, I will be

1 rejected, and I will be given a 15-digit number. I can then go
2 to the website, and I can find out why I was rejected; is that
3 right?

4 MS. MORALES: Correct.

5 THE COURT: Okay. And if it happens to be one of the
6 reasons that I just stated, ie., that I, say, for example,
7 inherited a gun -- right? -- from my father, let's just say, so
8 now somehow I can get into the AFS system by getting this
9 notarized statement or by -- if I can find the purchase
10 information of when I purchased the weapon, I can submit that,
11 and that will all get me into the AFS system; is that a fair
12 statement?

13 MS. MORALES: Can you repeat that, please?

14 THE COURT: Yes. So I gave you a couple of
15 examples -- or several examples of why someone might not be in
16 the AFS system. I'll just focus on one. Okay?

17 All right. So I bought a shotgun or a rifle in 1995.
18 My understanding is that prior to 2014, long guns did not make
19 the AFS system; is that true?

20 MS. MORALES: Yes.

21 THE COURT: Okay. So hypothetically, I bought a long
22 gun in 1995. I go in, I try to get an AFS standard background
23 check, and they tell me, "You have been rejected." So they
24 give me a 15-digit number, I go over to the website, and it
25 tells me that I don't have a gun registered in the AFS system.

1 So now --

2 MS. MORALES: Your Honor, can I interrupt for just a
3 moment? The system --

4 THE COURT: Absolutely.

5 MS. MORALES: -- will tell you that you were rejected,
6 and it will give a generic statement to the effect of the
7 information that you provided did not match an AFS record or
8 you did not have an AFS record. It doesn't specifically state
9 why you were rejected, though. It doesn't go into the
10 specifics.

11 THE COURT: Okay. So then let's suppose then the
12 average person out there, I maybe have a high school education
13 or a ninth grade education, I bought a gun in 1995, it was a
14 shotgun, and I go in to buy ammunition at the vendor.

15 The vendor says, "You've been rejected."

16 I go to the website, I type in my 15-digit number.
17 Now, how do I know why I've been rejected, and how I can remedy
18 whatever the rejection issue is?

19 MR. RICHARDS: Your Honor, this is Nelson Richards.
20 Can I jump in for just a moment?

21 THE COURT: Sure.

22 MR. RICHARDS: I just want to clarify something about
23 the hypothetical you're asking.

24 I think the way it's phrased -- the way that you
25 characterize it, I think I understand where you're going with

1 this, but I'd just like to point out that, in that
2 hypothetical, the person would not have an AFS entry and would
3 thus not be -- because the long gun purchase in 1995 wouldn't
4 be an AFS -- it wouldn't be eligible for the standard check.

5 That would be someone who would have at least two
6 options. That the two main options would be to use a basic
7 check, which are outlined in Ms. Morales' declarations, or to
8 go through the process of having that long gun purchase in 1995
9 entered into AFS.

10 And I think Ms. Morales could explain that process --

11 THE COURT: Yes.

12 MR. RICHARDS: -- for you.

13 THE COURT: That second option that you were referring
14 to, Mr. Richards, is what I was trying to get at. Okay.

15 So I got my rejection that says there is no AFS
16 record. Okay. So -- but it doesn't tell me -- or does it tell
17 me that it's because I don't have any weapons in the AFS
18 system, or is that just implied?

19 MS. MORALES: It won't specifically tell you you don't
20 have any weapons in the AFS system, so it would be implied.

21 THE COURT: Okay. So I guess what I'm getting at is,
22 how would that person, that average Joe or Jill, if you will,
23 how would they know what they need to do in order to correct
24 whatever it is that rejected them? How would they know that?

25 MS. MORALES: Our website talks to the fact that if

1 they do not have a firearm recorded in their name, they have
2 options to record the firearm. They have the ability to record
3 the firearm, and therefore, then create an entry into the
4 Automated Firearms System.

5 THE COURT: Okay. That's what I was trying to get at.

6 But somehow they learn that, right? They're told you
7 are not in the AFS system because you do not have a firearm
8 recorded, right?

9 MS. MORALES: They would have to glean that
10 information.

11 THE COURT: I'm sorry. They would have to what?

12 MS. MORALES: They would not be told specifically.

13 THE COURT: So they would have to devise this
14 information somehow? They would have to say, oh, I've been
15 rejected, and the reason why I was rejected is because they
16 don't have a record of me, and the reason why they don't have a
17 record of me is because I don't have a firearm in the system?

18 MS. MORALES: Yes.

19 THE COURT: Just out of curiosity, why couldn't the
20 State tell someone we can't process -- I'm not talking about at
21 the point of sale, I'm talking about subsequently, when the
22 person enters the 15-digit number -- why couldn't the State
23 tell them this is why we can't process your application,
24 because you do not have a firearm registered in the AFS system?
25 That seems like such a simple thing to do.

1 MR. RICHARDS: Your Honor, this is Nelson Richards.

2 THE COURT: Yes.

3 MR. RICHARDS: I understand what you're asking, and
4 with all due respect, I think that's a bit outside of the data
5 that Ms. Morales has provided in her declaration.

6 THE COURT: well, I'm asking you. I mean, this
7 doesn't have to go to Ms. Morales.

8 Look, you're the State. You folks have this set of
9 laws and these sets of rules. And one of the things that I'm
10 trying to work my way through is whether or not this is a
11 reasonable fit. And in determining whether or not it's a
12 reasonable fit, I have to determine the degree of burden.

13 I mean, certainly, Mr. Richards, I think you would
14 agree that if the State said, "well, you know, we'll allow you
15 to buy ammunition, but you can only buy ammunition on
16 February 29," my guess is that you would agree that that
17 probably would be rather an onerous burden. Don't you think?

18 MR. RICHARDS: Yes, Your Honor. In other words, a law
19 that says you can only buy ammunition on the leap day of Leap
20 Year? I think that would be constitutionally problematic. I
21 would agree.

22 THE COURT: Okay. So all I'm trying to find out is,
23 if there is a reason why we make a process difficult for the
24 citizen -- and I assume, Mr. Richards -- I don't recall from
25 what you've filed -- but I assume that you agree that the right

1 to buy ammunition is protected by the Second Amendment,
2 correct?

3 MR. RICHARDS: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. RICHARDS: Under Jackson and other cases, yes.

6 THE COURT: That's right. That's right.

7 So what I'm trying to find out -- and this is kind --
8 this is really important, is, okay, so are the restrictions,
9 the manner of restricting the purchase of ammunition,
10 reasonable?

11 And all I'm trying to find out is, is there some
12 reason why that hypothetical 9th grade graduate or 12th grade
13 graduate who goes to and puts in and asks for a standard
14 background check, and is rejected, and is then given the
15 15-digit number, why he or she could not go to the website and
16 simply be told, rather than given this vague, ambiguous
17 response, that you're not in the system -- that they would be
18 told you're not in the system because there's not a firearm
19 registered to you in the AFS system.

20 See what I'm saying? why not make it easier for the
21 citizen rather than more difficult? Is there something I'm
22 missing as to why that can't be done?

23 MR. RICHARDS: Your Honor, I'm not sure that I'm able
24 to answer that question. I think I'd say that there may be
25 reasons that it can't be done, but I don't know them off the

1 top of my head.

2 I do know that it's perhaps easy, from the outside, to
3 look at this as a monolithic system where you can very easily
4 change things, but that is not, in fact, the case.

5 we have several databases working with one another,
6 interacting, and what may seem, from the outside, like a simple
7 change to the system may be, in fact, quite a difficult thing
8 to accomplish.

9 I'm not saying as a matter -- you know, certainly,
10 that that's the case, but I do know that these questions are
11 more complex than could the system just be changed to do that,
12 and there may be reasons that I'm not aware of right now that
13 we -- that that may not be either feasible or optimal from,
14 say, a law enforcement point of view.

15 THE COURT: But -- okay. Well, it's just that it
16 seems to me, Mr. Richards, this. Look, you, as the State,
17 create some --

18 So prior to July of last year, citizens of this State
19 could go in and buy ammunition anytime they wanted to, however
20 they wanted to, there were no restrictions.

21 Now, suddenly, the State says, "well, we're going to
22 put restrictions on your buying the ammunition." And
23 certainly, you can't make those restrictions such that it makes
24 it unnecessarily difficult for the citizens to buy the
25 ammunition.

1 And so I was looking at this, and I was thinking,
2 okay. So fine. So you go in, you put your dollar, and you ask
3 for an AFS check, and you get a rejection, you get the 15-digit
4 number, you go to the website, and you try to find out, okay,
5 so why was I rejected?

6 And by the way, I have -- you know, I'm probably a
7 little older -- or quite a bit older than any of you. Some of
8 my buddies either do not have a computer or are not computer
9 literate. So, you know -- and we may not understand all that's
10 in that computer website.

11 But if the State creates the restriction, it would
12 seem that it would be the State's responsibility to make it as
13 simple or as easy for a citizen to be able to exercise their
14 Second Amendment right, rather than making it more difficult
15 for them.

16 So that's why I was asking the question. To me, it
17 seems like it would be so simple to be able to say -- I mean,
18 somehow or another, whatever databases you're working with,
19 somehow that database is figuring out that this individual does
20 not have an AFS record. Somehow, it figures that out.

21 And if it can figure that out, why can't it tell the
22 citizen, this is why we're rejecting you. We're rejecting you
23 because you do not have a firearm registered to your name.

24 Now the person knows. They don't have to devise this,
25 they can -- they know. And so they know that there's a

1 process, right? As Ms. Morales just indicated, there's a
2 process that you can go to in order to register your firearm,
3 right?

4 So, for example, going back to my hypothetical, the
5 individual bought a shotgun in 1995. Maybe, maybe they have a
6 record of the purchase, or maybe they remember, if they bought
7 it through an FSL, who the FSL was, maybe they can go back and
8 get that record, and now they can submit the requisite
9 information to whomever that is so that they can get their
10 record created so that, from now on, they can use an AFS check.
11 I don't know. Does that seem unreasonable?

12 MR. RICHARDS: I understand what Your Honor is saying.
13 And if -- if that -- if you're asking for us to look into
14 whether that's possible and whether that can be done, that's
15 something I think we could do and get back --

16 THE COURT: That would be great. That would be great,
17 Mr. Richards. If you could do that, I really would appreciate
18 that.

19 Now, as I understand this -- and Ms. Morales can
20 probably answer this --

21 All right. Well, let me go back just a minute.

22 So I asked the question about what happens if you are
23 a citizen who wants to buy ammunition, you go through the AFS,
24 you're rejected. And I asked whether or not there was some
25 appeal process, some due process that is provided to this

1 person, somewhere where they can go where they can correct the
2 issue.

3 And I think Ms. Morales said that there was, but she
4 didn't know what it was.

5 Did I get that correct? Did I understand you
6 correctly?

7 MS. MORALES: This is Mayra.

8 Yes, I said I believe there is, but I do not know the
9 details of that process.

10 THE COURT: Okay. So could you provide me,
11 Mr. Richards, with information of how -- what due process is
12 provided to an individual that has been rejected so that they
13 can go to some process that would help them resolve, if the
14 State says, no, you don't qualify for whatever reason, and the
15 individual says, well, the State's wrong, is there some vehicle
16 by which the individual can get that resolved, or is it just
17 simply that the State says, well, we're the State, too bad, so
18 sad, you're stuck with whatever we say?

19 So if you could provide me, Mr. Richards, with
20 whatever information you can that helps me determine whether or
21 not there's due process provided to the citizen to help the
22 citizen resolve any disagreement or dispute that may arise out
23 of his or her request for an AFS standard background check.
24 Will you do that for me?

25 MR. RICHARDS: This is Nelson Richards.

1 Yes, Your Honor. And may I have a moment to confer
2 with Ms. Morales? I just have a question for her. Would you
3 mind?

4 THE COURT: I'm sorry? I didn't hear you. I
5 apologize.

6 MR. RICHARDS: Would you mind if I take one moment to
7 confer with Ms. Morales on mute?

8 THE COURT: Oh, absolutely not. Go ahead.

9 MR. RICHARDS: Okay. One moment. Thank you.

10 THE COURT: Sure.

11 (Pause in the proceedings)

12 MR. RICHARDS: Your Honor, I was just checking with
13 Ms. Morales because she has, in her declaration, described the
14 process by which someone who's been rejected, that is, someone
15 who has an AFS mismatch, can correct their record using the
16 CFARS's method in her declaration. I think she was familiar
17 with that. I just wanted to clarify that with her.

18 There is a second category of people, those are --
19 those who are denied as prohibited people, and I think it might
20 help us if we had some clarification from Your Honor. Are you
21 talking about the process for someone who's been rejected
22 because of a mismatch in the Automated Firearms System, what
23 steps that person can take, or are you talking about the person
24 who's been denied because the Department's records showed them
25 as being prohibited, and what steps that person can take?

1 Because I think they might be on two separate tracks.

2 THE COURT: Okay. Well, I'm sorry, Mr. Richards, but
3 the problem with this case for me is that every time that I
4 answer a question, it results in my asking two more questions,
5 and that's a little troublesome. But okay.

6 Let's assume, for example -- let's assume that my
7 address -- or my address is XYZ, and the State says this does
8 not comply -- or does not meet our records. Your address is
9 not XYZ, your address is ABC. And you, the citizen, say, well,
10 your records are wrong, my address is XYZ.

11 How does that get resolved?

12 MS. MORALES: Your Honor, this is Mayra.

13 That individual would have the option of logging onto
14 the California Firearms Application Reporting System and
15 submitting an AFS information update application for the
16 purpose of updating their address.

17 THE COURT: I see. Okay. All right.

18 So the appeal process, I guess -- and we're then
19 limited to -- is whether or not someone is deemed to be a
20 prohibited person, but they don't think they are a prohibited
21 person, maybe they're not even the same person that is
22 determined to be a prohibited person. What is the appeal
23 process that they have to go through in order to rid themselves
24 of that prohibited person designation?

25 I think that's -- to me, that might be important. But

1 so anyway.

2 If there is an appeal process by which that can be
3 resolved, I'd like to know what that is.

4 MR. RICHARDS: This is Nelson Richards.

5 Yes. I understand the question.

6 THE COURT: All right, great. Thank you.

7 Now, turning my attention to the basic check.

8 Through January, as best as I can tell, there were 770
9 basic checks that were submitted, and that was through January
10 of this year. Oh, no. I'm sorry. There was 19,000 -- I'm
11 sorry. I misspoke. I know what happened. Just a second.
12 Let's backtrack for just a second.

13 So we know for a fact that there were 770 people
14 altogether who were determined to be prohibited persons. And
15 that includes the standard and the basic checks. And out of
16 those, there are 590 that were checked, and 16 of those citizen
17 eligible; is that right?

18 So 16 out of the 590 were found to be not prohibited
19 persons, even though the original finding was that they were
20 prohibited persons.

21 MS. MORALES: A total of 10 were -- excuse me. Just a
22 moment. A total of -- this is Mayra.

23 A total of 10 purchasers who were ineligible to
24 purchase ammunition on the face of their official records were
25 later determined to be eligible.

1 THE COURT: A total of 10 out of the 590?

2 MR. RICHARDS: Your Honor, this is Nelson Richards.

3 I believe we're looking at paragraphs 55 and 56 of

4 Ms. Morales' third supplemental declaration?

5 THE COURT: Yes. Right. specifically, paragraph 56

6 says that 16 of the purchasers have been determined to be

7 eligible, not 10.

8 MS. MORALES: I apologize, Your Honor. Yes, that is

9 correct.

10 THE COURT: Okay. All right. So there's still almost

11 200 that have not yet been screened to determine whether they

12 were really prohibited persons or not, right? Almost 200. My

13 math is terrible. I'm going to guess that it's probably 180.

14 MS. MORALES: Correct.

15 THE COURT: Okay. All right. Now, getting to the

16 basic check.

17 As I understand it, there were 19,753 applications

18 through the end of January.

19 MS. MORALES: Your Honor, can you repeat that, please?

20 THE COURT: Yes. 19,753.

21 MS. MORALES: Correct.

22 THE COURT: All right. And there were 342 rejections;

23 is that right?

24 MS. MORALES: I would have to tabulate that, Your

25 Honor, to confirm that.

1 MR. RICHARDS: This is Nelson Richards. 107 plus 235
2 would be 342. Is that the number Your Honor is asking about?

3 THE COURT: Yes. All right.

4 Now, Mr. Richards, I have some questions that I think
5 are probably more in your bailiwick than Ms. Morales.

6 So I was looking at Senate Bill 1235. And Senate Bill
7 1235 provides -- it says the following: "This bill would, if
8 the safety for All Act of 2016 as enacted by the voters of the
9 November 8, 2016, statewide general election, amend the Act to
10 instead allow ammunition to be sold only to a person whose
11 information matches an entry in the Automated Firearms System
12 and who is eligible to possess ammunition, to a person who has
13 a current certificate of eligibility issued by the Department,
14 or to a person who purchases or transfers the ammunition in a
15 single ammunition transaction as specified."

16 I was trying to figure out what "as specified" means.
17 What does -- where do I find what that means?

18 MR. RICHARDS: Your Honor, I apologize. I don't have
19 the language of SB 1235 in front of me, and I don't know the
20 answer to that off the top of my head.

21 I do know that SB 1235 prospectively amended various
22 aspects of Proposition 63, but that reference could be to a
23 single purchase referred to in a provision of Proposition 63.
24 But sitting here right now, without those statutes -- the
25 proposition initiative and the Senate Bill in front of me, I'm

1 afraid I don't know.

2 THE COURT: would you be able to provide that for me
3 when you're providing the information regarding the appeal?

4 MR. RICHARDS: Yes, Your Honor.

5 THE COURT: Because I just have no idea what that
6 means, "as specified".

7 MR. BRADY: Your Honor, this is Sean Brady on behalf
8 of the plaintiffs.

9 Mr. Richards' inclination is correct. That is, in
10 reference to my understanding, is that is in reference to the
11 basic check.

12 The legislature, via that provision, tasked the
13 Department of Justice -- the California Department of Justice
14 with creating a system for a one-time ammunition purchase,
15 which is the basic check, and DOJ -- California DOJ went ahead
16 and created that system, which is what we are referring to as
17 the basic check, so that's what that provision refers to.

18 THE COURT: But I was wondering about that language
19 "as specified". Is there like -- so "as specified", meaning
20 where -- where do I look in the statute to see what "as
21 specified" means?

22 I understand what you're saying, Mr. Brady. In fact,
23 I think that's probably what it was referring to, but I just
24 don't see any language that amplifies what "as specified"
25 means.

1 MR. BRADY: Your Honor, this is Sean Brady. It's
2 specified in regulations, not in the statute.

3 So it basically said DOJ created this system, and DOJ
4 did via regulations, which I could get you the section numbers
5 for shortly, if you give me a minute.

6 THE COURT: All right. Well, why don't you look that
7 up, and while you're looking that up, I'm going to ask
8 Mr. Richards another question, which is kind of, again, more in
9 his bailiwick.

10 But going on, the next sentence says, "If the Act is
11 enacted by the voters, the bill would amend the Act to charge
12 ammunition purchasers and transferees a per transaction fee not
13 to exceed \$1."

14 And so I'm wondering, because -- and the reason why I
15 ask Mr. Richards is this. Look. There are -- for some of us,
16 \$18 may not be a lot of money, but for some people who enjoy,
17 for example, target practicing, or they want to take their kids
18 or grandkids out plinking, or maybe they want ammunition to
19 protect themselves, you know, that \$18 could be a whole lot of
20 money.

21 I mean, right now, with this coronavirus stuff going
22 on, I suspect there are a lot of people who are hurting
23 financially, and that \$18 can make a world of difference,
24 particularly if you do more than one transaction.

25 So I'm wondering, if the statute says \$1, where does

1 that \$19 charge come from?

2 MR. RICHARDS: Your Honor, this is Nelson Richards.

3 Again, I'm going to have to apologize. Given the
4 nature of today's hearing, we're -- I'm not in my office with
5 all my materials, and I believe there's another provision in
6 either Proposition 63 or somewhere in 1235 that specifies that
7 \$19 is the amount that we charge for the single transaction.

8 And I'd have to double -- I'd have -- I might be
9 wrong, but I'd have to look and figure out where the \$19 number
10 comes from. I don't know if it's in the statute or if it's
11 somewhere else, but I would have to doublecheck that.

12 THE COURT: That kind of gets me to an issue that I
13 think is really interesting, so -- because I'll tell you. I've
14 long been a believer that laws should be written and drafted so
15 that the reasonable person can understand them, not someone who
16 graduated summa cum laude from Harvard Law.

17 And obviously, I'm not in the latter category, as I'm
18 sure you've probably already figured out.

19 But I'm trying to figure out, what really is the law,
20 and I'm trying to figure out, where does this authority come
21 from to preemptively amend a proposition that is submitted to
22 the people for a vote?

23 So as I understand it, we have this proposition
24 initiative process in the State of California in which restores
25 or which provides the people the final say on what the law is,

1 subject to being interpreted, of course, by the courts and so
2 on, but --

3 And so there was this proposition that was put on the
4 ballot that the people voted on, and it was represented to them
5 that this is what the law was on the subject. And apparently,
6 the legislature has decided that it doesn't matter what the
7 people voted for, we're going to preemptively amend the
8 proposition enacted by the people.

9 There's something about that that strikes me as being
10 totally and completely anti Democratic and antithetical to the
11 whole proposition procedure.

12 So is there a case? Because we tried to find
13 authority for the proposition that the State can preemptively
14 amend or modify a proposition that has been submitted to the
15 voters and represented to the voters as being the law on a
16 subject. Couldn't find anything.

17 And I didn't see anything in your filings,
18 Mr. Richards, that indicated that there is -- that the
19 legislature has that power.

20 Can you find that for me and tell me where that comes
21 from?

22 MR. RICHARDS: Yes, Your Honor. I can give you, I
23 think, a broadbrush answer right now, and then if you'd like
24 more after I provide that answer, I'd be happy to provide more
25 detailed discussion.

1 THE COURT: Sure. Why don't you give me the
2 broadbrush.

3 MR. RICHARDS: Sure. Article 2, Section 10(c) of the
4 California Constitution is actually the controlling authority
5 on the relationship between the legislature and the people with
6 regard to the initiative process.

7 while I don't have that right in front of me, I'm
8 fairly familiar with that section. It says something to the
9 effect of, "Valid initiatives enacted by the people can only be
10 amended by their terms, and then the legislature can amend
11 those initiatives as permitted by the terms of the initiative."
12 But that's the controlling standard.

13 And so the way this works out in practice, when you
14 look at whether a legislative enactment is permissible, you
15 engage in a two-step inquiry.

16 First, you look at Article II, Section 10(c) of the
17 California Constitution, and then you conduct a two-step
18 inquiry where you say, well, does this initiative -- or excuse
19 me -- does the statute -- proposed statute or statute does it
20 amend the initiative.

21 I think with regard to SB 1235, that would -- the
22 answer would certainly be yes, as disputed in cases often, and
23 I've litigated a few of those cases.

24 But then you get to the second step of the inquiry
25 which is, is the legislature enactment permissible under the

1 terms of the initiative, and to answer that question, you go to
2 the text of the initiative, and you look to see whether the
3 initiative allowed for an amendment.

4 And I believe -- again, I don't have Proposition 63
5 right in front of me, but I believe Prop 63 did contain that
6 language and -- language allowing an amendment, and that is
7 what the legislature was relying on when it enacted SB 1235.

8 Now, people do litigate whether amendments are
9 permissible -- again, I've litigated a few of those cases in my
10 day -- but that is a question of state law and not one that we
11 understand the plaintiffs to have raised in this case, and not
12 really at issue, which is why we did not explain this
13 particular issue in our briefing.

14 THE COURT: well, let me tell you why I -- it may be a
15 question of state law, not a question of federal law, but it
16 becomes a question of federal law when I'm trying to figure out
17 whether the burden imposed by the State on a constitutionally
18 protected right is reasonable.

19 And so I've asked you questions about the basic and
20 the standard background checks, and the reason why I've asked
21 those questions is because one of the things I'm trying to
22 determine, as I said to you earlier, Mr. Richards, certainly,
23 the State can't say, well, you can buy ammunition, but you can
24 buy it on February 29th. Only on February 29th.

25 So there's this broad spectrum, I suppose, of manner,

1 time, and place restrictions that might be able to be imposed,
2 but in the end, someone has to make a determination as to
3 whether or not the manner, whether the fit is reasonable or not
4 reasonable.

5 And in doing that, I'm trying to figure out, for
6 example, well, where does all this come from?

7 Because if I look at the proposition, Mr. Richards --
8 and I think this is very interesting -- the proposition that
9 was represented -- I mean, there was an affirmative
10 representation made to the people of the State of California:
11 If you pass this, this is what's going to happen. This will be
12 your burden. In order to exercise your Second Amendment
13 rights, this will be your burden.

14 And specifically, specifically, I'm referring to a
15 couple of things. First of all, at Article 4, Section 30370,
16 it talks about the State creating and maintaining internal
17 centralized lists of all persons who are authorized to purchase
18 ammunition. So it places the burden on the State to create
19 this list or this database of people who are authorized to
20 purchase ammunition.

21 And then, there's this other very interesting
22 provision. Again, this just simply goes to whether or not the
23 fit is a reasonable fit as currently imposed by the State where
24 there's this provision in what was represented to the people
25 would be the law, which is that you can apply for a certificate

1 to purchase ammunition, you pay 50 bucks, and that certificate
2 is good for four years.

3 And, of course, the State maintains the centralized
4 database, which means that if I have acquired this ammunition
5 purchase certificate, which is good for four years, if I become
6 an ineligible person, then the State can essentially revoke my
7 certificate. You see?

8 Now, why is that important? Because, you see, it
9 doesn't require that I tell the State, for example, what
10 firearms I own, number one, as I would have to if I wanted to
11 go through the AFS check.

12 Number two, I get my certificate, and I'm good to go.
13 I'm basically where I was prior to July of 2019. I can walk in
14 anytime, to any vendor, I can present them with my certificate,
15 I walk out with my ammunition. That's a -- to me, that's a
16 rather insignificant burden. I mean, it's not completely
17 insignificant, but you see what I'm saying.

18 But otherwise, what I have to do is I have to go in,
19 and I would do the basic or the standard background. And if I
20 do the basic background check, we're looking at, as best as I
21 can tell from Ms. Morales' declarations, we're looking at, you
22 know, two days that I'd have to wait, and I have to pay \$18 --
23 I'm sorry -- \$19 each time. So to me, it's important.

24 And now, okay. So now the people were told, this is
25 what will be required of you if you want to buy ammunition.

1 And then somehow or another, the State preemptively -- and by
2 the way, it's not mentioned anywhere in the proposition that
3 there's this other law that the legislature has enacted that
4 will essentially make some of what's in the proposition
5 meaningless or not effective, which I think is -- you know, I
6 don't know -- I think that's rather an odd way to deal with the
7 people.

8 But so that's why, to me, it's important. I want to
9 know, where does this authority come from to preemptively enact
10 statutes that might either completely extinguish, or modify, or
11 alter, or amend a proposition that is subsequently amended --
12 I'm sorry -- subsequently passed by the people.

13 If we were talking about -- look. If we were talking
14 about whether or not I have to have a GFI in my bathroom, when
15 I had a bathroom, who cares. If -- maybe they're talking about
16 what I have to do in order to get a driver's license or an
17 identification card, who cares.

18 But here, we're talking about some pretty important
19 stuff. I mean, this is in the Bill of Rights. This is in --
20 and so, to me, it seems like, first of all, the people should
21 be told honestly what it is that they're voting for and what
22 effect it's going to have, and secondly, if the State's going
23 to tamper with what the people have voted for, that they should
24 be told ahead of time that, you know, whatever it is you vote
25 on, guess what, it doesn't mean anything because we, the

1 legislature, are going to change it.

2 So I'm not saying that it's not the law, but if it is
3 the law, I'd sure like to see some support for it, because I
4 did not see it in any of the filings.

5 So Mr. Richards, I would appreciate it if you could
6 get me authority that says that, in fact, the State can
7 preemptively modify, or amend, or extinguish a proposition that
8 is subsequently adopted by the voters of the State of
9 California. So now --

10 And now that gets me to another issue. Again, to me,
11 this goes to the burden that's being placed on the citizens'
12 right to exercise their Second Amendment right.

13 I'm wondering. There's this database -- and I know,
14 Mr. Richards, you and I talked about this once before, but I
15 was left with considerable questions about how this works --
16 but the AFS, or standard background check, assumes that, at
17 some point in time, I have told the State of California that I
18 own a certain weapon.

19 So as I understand Ms. Morales' declaration, if I have
20 a record, an AFS record, I can walk into an ammunition vendor,
21 I can give them my Real ID or my passport, and they can almost
22 instantaneously, within minutes, tell me whether or not I can
23 buy that ammunition.

24 Is that a fair understanding of Ms. Morales'
25 declaration?

1 MS. MORALES: Your Honor, this is Maya.

2 Yes, that is correct.

3 THE COURT: Okay. Now, other than the fact that the
4 State knows that I own a firearm, because either I have told
5 them, having been rejected once -- okay? -- and now I did what
6 I needed to do in order to create an AFS record, or the fact
7 that sometime back I purchased a firearm -- what happens now is
8 that there's this database that is accessed somehow when I go
9 into that vendor, there's this database that's accessed that is
10 called the Armed Prohibited Persons Database. And that Armed
11 Prohibited Persons Database is a database that was created by
12 and maintained by the State of California, right?

13 MR. RICHARDS: Yes, that's correct.

14 This is Nelson Richards.

15 THE COURT: Okay. Now, I'm wondering. Where does the
16 information for the Armed Prohibited Persons System Database,
17 where does that information come from? What databases does
18 that database look to such that it makes it, essentially,
19 instantaneous for someone who applies for a standard background
20 check to be able to almost instantaneously know whether he or
21 she can buy ammunition?

22 MS. MORALES: Your Honor, are you asking -- I want to
23 make sure I understand your question.

24 THE COURT: Okay.

25 MS. MORALES: You're asking where will you -- when you

1 conduct the standard ammunition eligibility test, and after I
2 have checked the Automated Firearms System to see if you have a
3 record, and then after that it checks APPS, where APPS gets
4 this information from?

5 THE COURT: Yes. Yes. Precisely.

6 MS. MORALES: So generally speaking, from what I
7 understand, or what I'm -- based on my experience, I believe
8 APPS gets the information from -- from the dealer record of
9 sales and --

10 THE COURT: I'm sorry. I'm sorry. Say that again.

11 MS. MORALES: -- the dealer record of sale
12 application.

13 And I believe our IT team can better speak to that.
14 But they get the info -- when an individual purchases a
15 firearm, that information not only goes into the AFS, but it
16 also populates the Armed Prohibited Persons System.

17 THE COURT: Yes. Okay.

18 But if you use my hypothetical where I didn't actually
19 purchase the firearm, the purchase is -- that the firearm was
20 given to me, I inherited it, or I bought it in a private sale
21 in some state that doesn't require registration, and so on -- I
22 was walking down the street and I found it, you know, I mean,
23 whatever, whatever the reason is, I know that there's a vehicle
24 by which I can go to the AFS system and say, hey, I have this
25 firearm, and I'm essentially -- I'm now creating a record in

1 the AFS system, right?

2 MS. MORALES: Your Honor, if you had -- this is
3 Mayra -- if you had a firearm that you wanted to report under
4 your name, you would submit your application, it could be a
5 firearm ownership report to the Department of Justice, you
6 could submit that manually, or you could submit that
7 electronically through the California Firearms Application
8 Reporting System, and then we would process your application.
9 Once it was processed and approved, after conducting a
10 background, that info -- your -- your firearm record would be
11 in the Automated Firearms System.

12 THE COURT: Right. I got that. Okay. So I follow
13 that.

14 So I submitted my application. I said, look, I've got
15 this firearm. I was walking down the street, I found it. You
16 know. I don't have any criminal history. Whatever I have to
17 do in order to get into the AFS system, I got into the AFS
18 system, however I got into the AFS system.

19 Now, perhaps a better example, because it's probably a
20 more realistic example. I'll bet there are a lot of people,
21 lot of people that purchased firearms -- long guns, for
22 example, rifles, shotguns -- before 2014, so they would not be
23 in the AFS system, right?

24 MS. MORALES: That is correct, unless they reported
25 the firearm after the fact.

1 THE COURT: Right. So let's take the hypothetical
2 system. Jill Doe bought a shotgun in 1995. She's not in the
3 AFS system. So she goes in and asks for a standard background
4 check to buy ammunition. She's rejected. She goes to -- she
5 gets her 15-digit number, she goes to the database -- or to the
6 website, she does whatever she has to do, whatever she has to
7 do in order to create the record that she owns this firearm.

8 Now, what the standard background check does is it
9 goes and looks at the Armed Prohibited Persons Database, right?

10 MS. MORALES: Correct, after it checks the Automated
11 Firearms System.

12 THE COURT: But all the Automated Firearms System
13 tells them is that this person owns this firearm, right?

14 MS. MORALES: It has a record of the firearm
15 transaction, yes.

16 THE COURT: Okay. All right. So the next thing that
17 happens is that somehow, somehow or another, however this
18 happens mechanically, the next thing that happens is that it
19 checks the Armed Prohibited Persons Database, and it looks to
20 see if this person has, for example, a domestic violence
21 restraining order against him or her, right?

22 MS. MORALES: It checks to make sure there are no
23 prohibiting -- well, yes.

24 THE COURT: Okay. My question was essentially geared
25 to this: Where does the Armed Prohibited Persons System get

1 its information? What databases does it look to in order to
2 populate its database?

3 MR. RICHARDS: Your Honor, this is Nelson Richards.

4 If Ms. Morales knows, she can answer. I don't know
5 whether she does or not. But I just wanted to, again, offer,
6 to the extent she's unable to answer, that that's additional
7 information that we can provide to the Court, if the Court is
8 interested in that specific question.

9 MS. MORALES: Your Honor, it's Mayra.

10 I believe -- and I can confirm this -- but it checks
11 the Automated Criminal History System, the Wanted Persons
12 System, the California --

13 THE COURT: Restraining and Protective Order System?

14 MS. MORALES: -- Restraining and Protective Order
15 System, and the Mental Health Firearms Prohibition System.

16 THE COURT: Okay. So -- so --

17 MS. MORALES: And, Your Honor --

18 THE COURT: Yes.

19 MS. MORALES: Excuse me. This is Mayra.

20 THE COURT: Yes.

21 MS. MORALES: That is very -- that is a process -- the
22 Armed Armed Prohibited Persons System and the way it works is a
23 process all in itself, and I just wanted to let you know, it's
24 more -- that is me just generally speaking.

25 THE COURT: I'm sorry. I missed what you said. Can

1 you repeat what you said?

2 MS. MORALES: Yes. I have said that the Armed
3 Prohibited Persons System and the way it works, is obviously a
4 process that is very involved, and what I provided is
5 information generally speaking.

6 THE COURT: Okay. I'm trying to be more specific,
7 though, because I'm trying to find out -- here's what -- here's
8 what's kind of troubling me.

9 Again, getting back to what the initiative said as far
10 as the cost of getting an ammunition purchase certificate, and
11 the fact that there are people who cannot afford an extra \$18
12 every time that they go purchase ammunition.

13 So what is it that makes the standard background check
14 so quick and so cheap as compared to, for example, the basic
15 background check?

16 MS. MORALES: Your Honor, this is Mayra.

17 The standard ammunition eligibility check is a
18 systematic check, whereas the basic ammunition eligibility
19 check would require someone, potentially an analyst, to review
20 the crim -- the information or the background check, the hit on
21 an individual.

22 THE COURT: Well, what -- what does the -- what does
23 the basic background check check that is not in the Armed
24 Prohibited Persons System?

25 MS. MORALES: Your Honor, I don't understand your

1 question. I apologize. Can you repeat that?

2 THE COURT: Okay. So you tell me that it's an
3 automated check. So that means -- automated means that the
4 state of California has created this automation system. This
5 automation system that then goes and looks at this other system
6 called the Armed Prohibited Persons System, which then goes and
7 looks at five databases. This system that has been created by
8 the state is apparently very quick and very cheap.

9 what I'm trying to do is I'm trying to draw the
10 distinction between the standard and the basic check. What is
11 it that the basic check looks to or looks at that is not in the
12 Armed Prohibited Persons check?

13 MS. MORALES: Your Honor, I'm going to do my best.
14 Again, this is Mayra.

15 So once again, the standard check checks the Automated
16 Firearms System first and then the Armed Prohibited Persons
17 System.

18 within the Armed Prohibited Persons System, an
19 individual is identified as either prohibited or not
20 prohibited.

21 So if an individual is not prohibited in the Armed
22 Prohibited Persons System, it's based on that status they will
23 be approved. If they are prohibited, they will be rejected.

24 THE COURT: Right. I gotcha.

25 But what --

1 MS. MORALES: So, if they're --

2 THE COURT: Go ahead. Go ahead.

3 MS. MORALES: So going --

4 THE COURT: Let me -- let me -- so the basic check.

5 So I decide that I want to go through this expensive,
6 time-consuming process, for whatever reason. Maybe because I
7 know I don't have an AFS record. Okay? So I decide I want to
8 go through that. Okay.

9 So what happens next? The vendors somehow or another
10 does something that causes someone to do something that then
11 eventually is going to result in either my being approved or
12 disapproved. What I'm trying to find out is what those
13 somethings are.

14 MS. MORALES: For the basic ammunition eligibility
15 check, the individual would submit the information to the
16 Department of Justice. An analyst within our department -- or
17 the way it would work is the system would check the DMV to make
18 sure that the individual's information matches the record in
19 the DMV.

20 If it matches the record in the DMV, what then happens
21 is that a hit is generated for that individual based on their
22 identifying information. And what happens is that the -- it
23 checks against the Automated Criminal History System, the
24 Mental Health Firearms Prohibition System --

25 THE COURT: You're going too fast. You're going to

1 fast.

2 So it goes and looks at what now?

3 MS. MORALES: Automated Criminal History System, the
4 Wanted Persons System, the Mental Health Firearms Prohibition
5 System, and the California Restraining and Protective Order
6 System.

7 So it generates, in a sense, what we call a base -- a
8 basic ammunition eligibility check, which is a compilation of
9 the information from those systems for that individual, and an
10 analyst reviews that information to determine if the individual
11 is eligible to own or possess ammunition. So it takes a person
12 actually looking at that information.

13 Now, in some instances, an individual could
14 potentially be automatically approved if there are no hits in
15 the system.

16 THE COURT: What does that mean, there are no hits?

17 MS. MORALES: That no record came back on ACHS, CRPOS,
18 Wanted Persons System, or Mental Health Firearm Prohibition
19 System, there's no record of them in those systems.

20 THE COURT: So if I understand you correctly,
21 Ms. Morales, what happens is that there is a body --

22 MS. MORALES: Correct.

23 THE COURT: -- that then goes and, assuming that the
24 DMV identification and information matches, that there is a
25 body that looks at four of the five databases that the AFS

1 database looks to, right?

2 MS. MORALES: He has to check those four databases,
3 including the DMV.

4 THE COURT: Okay. Now, just out of curiosity, in
5 order to even run a background check, you have to have a Real
6 ID, and/or a passport, and/or a certified birth certificate,
7 right? You have to have all of this when you go through the
8 standard or the basic, right? In other words --

9 MS. MORALES: Correct.

10 THE COURT: -- you can't get your AFS background
11 checks unless you have one of those documents, one of which is
12 the driver's license, right?

13 MS. MORALES: Yes. You must have a Real ID, or if you
14 do not have a Real ID, if you have Federal Limits Apply ID, you
15 must have substantiating documentation showing that you are
16 legally present in the United States.

17 THE COURT: Okay. So really, the only difference, the
18 only differences that I can see between the standard and the
19 basic background checks are this:

20 Number one, for the standard, you have to have already
21 a record of a firearm. In other words, you have to have told
22 the State that you own a firearm. You don't have to do that if
23 you go through a basic background check, right?

24 MS. MORALES: Your Honor, it's Mayra.

25 You do not have to have a firearm record in AFS for

1 the basic check. That is correct.

2 THE COURT: So let's just see. Again, I kind of
3 warranted these things looking at possible hypotheticals.

4 So let's assume that I'm a gang member of the East
5 Side Gang. I have no prior criminal history, no prior criminal
6 record. I can go down and I can buy a firearm. And if I buy
7 that firearm, I can then go and buy all the ammunition I want
8 by going through an AFS standard background check. So long as
9 I do not become an armed prohibited person, I can be a member
10 of this gang, and I can buy all the ammo I want. Is that --
11 does that make sense?

12 MR. RICHARDS: Your Honor, this is Nelson Richards.

13 To the extent that we're using a hypothetical, I think
14 it's probably better that I answer the questions.

15 THE COURT: Sure. Go ahead.

16 MR. RICHARDS: But I think that -- I think, as you set
17 forth that hypothetical, in other words, as I understand it,
18 someone who happens to be a member of a street gang that has no
19 criminal history or other event that would prohibit them from
20 possessing a firearm under state or federal law, that person
21 can go in, purchase the firearm, and have an AFS entry created
22 that would then, in turn, allow that person to use standard
23 checks -- a standard ammunition eligibility check to purchase
24 ammunition in the future.

25 THE COURT: That's right.

1 MR. RICHARDS: Yes, that is correct.

2 THE COURT: Okay. All right. But let's forget the
3 gang member for just a minute. Let's go back to my being the
4 person who bought a shotgun back in 1995.

5 I've now created my AFS record. The only difference
6 between the standard and the basic background checks is that,
7 for the standard, you have a firearm record. So you told the
8 State that you own a firearm. You don't do that with the
9 basic, you do it with the standard.

10 with the basic, there's an automated system set up by
11 the State of California called the Armed Prohibited Persons
12 System that looks at you because you are in the AFS system, in
13 other words, that person that bought the 1995 shotgun is now in
14 the AFS system. John Doe, Jane Doe, it's in the system.

15 And now, the APPS system goes out and it looks at
16 those five databases, and it is able to, essentially, almost
17 instantaneously tell you whether you're approved or not
18 approved, right?

19 MS. MORALES: Your Honor, this is Mayra.

20 I'd like to clarify. For the Armed Prohibited Persons
21 System, an individual is either prohibited or not prohibited in
22 the system. The system does not, once again, go out and check
23 those databases. You're already in the system either a
24 prohibited or not prohibited. That check has already been
25 done.

1 THE COURT: Okay. But that's also done through a
2 database. So the Armed Prohibited Persons System accesses
3 those five databases that you told me about. That then is
4 imported into the APPS system, and the APPS system is then used
5 by the standard background check to determine whether or not
6 you are eligible to buy ammunition, right?

7 MR. RICHARDS: Your Honor, this is Nelson Richards.

8 I want to clarify exactly where the APPS system pulls
9 the information from, as Ms. Morales did earlier.

10 I believe it -- those databases, it's a much more
11 complicated process. As I understand things, and as
12 Ms. Morales is just saying, when you end up in the Armed
13 Prohibited Persons System, there's essentially a determination
14 that's been made that you are a prohibited person. This forms
15 the basis, not just for ammunition background check purposes --
16 ammunition background check, it also -- in fact, its primary
17 purpose is to disarm people who should not have firearms. The
18 Department of Justice and the Bureau of Firearms is actively
19 involved in taking away firearms from prohibited people.

20 THE COURT: Sure. I've read lots of reports.

21 Mr. Richards, believe it or not, I actually have
22 looked at various California publicly available records and
23 reports, and so on, and so yes, I understand all of that.

24 But I'm trying to find -- you see, what I'm trying to
25 do is I'm trying to find the mechanics how this all happens.

1 So the fact is that when you go to the AFS system, the
2 AFS looks to see that there's a record of you in the system.
3 So it's going to find your name. John Doe. Jill Doe.

4 And then it's going to check the Armed Prohibited
5 Persons System to see if you're a prohibited person or not a
6 prohibited person.

7 If it says -- finds that you're a prohibited person,
8 then it rejects you, and you would be turned down by the
9 vendor, and you could not buy any ammunition.

10 On the other hand, if you were not a prohibited
11 person, your purchase of the ammunition is almost
12 instantaneous, you pay your buck, you walk out with your box of
13 25 12-gauge shotgun shells, you're done, right?

14 MR. RICHARDS: Yes.

15 THE COURT: Okay. And the way the Armed Prohibited
16 Persons System gets its information is because it accesses, not
17 necessarily at that moment, but at some other point in time, it
18 has already accessed -- it's able to access these five
19 databases that Ms. Morales has told me about, right?

20 MR. RICHARDS: I'm not sure that that's the only thing
21 at work there. And the reason why I say that is because one of
22 the reasons why the basic ammunition eligibility check takes
23 longer is because you can end up with partial hits in one of
24 those databases, for example, which is what would prompt a
25 manual review of a basic ammunition eligibility check.

1 THE COURT: I'm sorry. Either I didn't hear you or
2 you got cut out a little bit. So go back. Do that one more
3 time.

4 MR. RICHARDS: Yes, Your Honor. This is Nelson
5 Richards.

6 So as I was saying, the -- those -- the four -- the
7 databases -- the Domestic Violence Database, for example,
8 those -- someone may have a partial hit in one of those
9 databases that may require a manual review for the basic
10 ammunition eligibility check. This is some -- there may be
11 some connection to say that someone's name comes up, or, for
12 example, there's a record of a criminal arrest that has no
13 final disposition, so someone is arrested for a felony but
14 there's no final disposition of whether they were convicted or
15 acquitted, for example.

16 For the basic check, an analyst needs to run that
17 determination down, and it is a much more labor -- can be a
18 much more labor-intensive process that accounts for the
19 extended time that the manually processed, basic ammunition
20 eligibility checks that are outlined in Table 1.3 of
21 Ms. Morales' declaration -- most recent declaration, that's the
22 distinction between the automatically processed and manually
23 processed. Manually processed requires an analyst to go out
24 and conduct some investigation.

25 what I think -- what I understand you to be asking is,

1 well, isn't there some similar process with regard to APPS? I
2 don't believe that's come up before, and I -- sitting here
3 today, I don't know the answer, but that is another area where
4 we can provide you with some additional information, if you
5 would like, about what goes into someone entering APPS.
6 Because once they're -- my understanding is, once they're in
7 APPS, they are a prohibited person. Again, as I mentioned
8 earlier, it forms the basis for --

9 THE COURT: But they're not, really. I'm sorry. Let
10 me interrupt you for just a minute.

11 But they're not really, and the reason why they're not
12 really is because the same thing happens. If I go in and I ask
13 for a standard background check, and it comes up with a
14 rejection because it says that I am a prohibited person, now --
15 and I disagree with that, then someone is going to have to go
16 through and look at the information -- say, for example, it was
17 the Restraining Order Database that generated a hit on the APPS
18 database that resulted in my being rejected.

19 So in that case, the very same thing is going to
20 happen, and that is that some individual is going to have to
21 walk back the hit at the Restraining Order Database in order to
22 determine whether or not I really am a prohibited person.

23 That's why I was so interested in the appeal process
24 at the very beginning, because it seems to me that the standard
25 and the basic background checks -- which, I'll go back, is not

1 in the initiative that was approved by the voters -- that
2 those -- I'm not saying that the State couldn't possibly -- in
3 fact, I would hope they could enact procedures that would be
4 even better than, but not to the exclusion of, that which the
5 voters approved in the initiative.

6 But if there's a hit in one of those four databases,
7 it's going to show up in the approved -- I'm sorry -- in the
8 Armed Prohibited Persons Database, which is going to wind up in
9 a rejection when the person goes to apply to purchase the
10 ammunition.

11 That person is going to say, well, wait a minute. I
12 don't know why I was rejected, and so they're going to do
13 whatever they need to do in order to get that corrected, which
14 is going to result in an individual walking back to check and
15 see whether or not that was accurate information, just as the
16 analyst would in the case of a basic background check.

17 So what happens is that the analyst is going to do the
18 background check, is going to check these four databases, and
19 if there is a hit, then they're going to reject the
20 application. But if there are no hits, then it's going to be
21 approved.

22 And the only difference, really, is -- besides the
23 fact that the standard background check checks one more
24 database -- well, actually, it's the same number of
25 databases -- but it's going to be the same thing. They're

1 going to be looking at the very same information. The only
2 difference being that one is automated, and the other one is
3 not; am I right?

4 MR. RICHARDS: I don't believe so, Your Honor.

5 THE COURT: Okay. You have to tell me why not.

6 MR. RICHARDS: And I think this gets to how the APPS
7 system works, which is not something that we provided
8 information on, and not something that I'm familiar enough
9 to -- with sitting here right now, to make representations to
10 the Court about.

11 And so, again, we could provide clarification on how
12 APPS works, to talk about how it's different from the -- both
13 the -- the automatic and the manual standard ammunition
14 eligibility check. But --

15 THE COURT: I could spend so much -- Mr. Richards, I
16 could spend so much time, because I am somewhat meticulously
17 trying to figure out the differences and how they affect the
18 buyer who is trying to buy ammunition.

19 And I thought that Ms. Morales did a really good
20 job -- which, by the way, I think I basically, probably already
21 knew, but I was trying to confirm it, because I didn't want to
22 put my big foot in my mouth by saying something that wasn't
23 true -- but Ms. Morales has pretty much confirmed exactly what
24 I just said, which is, if you have a record -- if your name is
25 in the AFS system, what it's going to do is it's going to check

1 the APPS system to see if you're a prohibited person or not.
2 And the way it's going to determine whether you're a prohibited
3 person or not is by checking the databases that she told me
4 about.

5 If you apply for a basic background check, what's
6 going to happen is that someone is going to manually check
7 those databases, and if there is a hit, they're going to try
8 and sort out why there's a hit. That's what I understood
9 Ms. Morales to say.

10 Now, maybe you're telling me that Ms. Morales, you
11 know, has provided me with information that I misunderstood,
12 but that's -- I mean, I stand to be corrected. I'm here. I'm
13 asking these questions because I want to learn because I think
14 it's important. I think this is an important issue for the
15 citizens of the state of California. I'm taking my time
16 because I want to know.

17 So I don't know who I have to ask. I don't know who I
18 have to bring in the court, if necessary, to get the
19 information from. But I think it's important that we all know.

20 And if Morales -- Ms. Morales -- if she doesn't know,
21 then she should tell me that she doesn't know.

22 MS. MORALES: Your Honor, it's Mayra.

23 THE COURT: Yes.

24 MS. MORALES: So you requested information on the
25 standard ammunition eligibility check and the process, and so I

1 did outline that it checks the Automated Firearms System, and
2 then it checks APPS.

3 It checks APPS to see if an individual is prohibited
4 in the system or if they're not prohibited. If they're not
5 prohibited, they're approved. If they're prohibited, they're
6 denied.

7 APPS, and how the individual gets in APPS, is separate
8 from the standard ammunition eligibility test. Individuals go
9 into APPS -- when an individual purchases a firearm, after the
10 purchase has been approved, those individuals get populated
11 into the Armed Prohibited Persons as not prohibited.

12 Subsequent to that, if they become prohibited at -- or
13 if something happens and it changes their record, the APPS
14 staff will then -- that is, that individual then falls into a
15 queue for an analyst to work.

16 This is -- again, this is separate from the standard
17 ammunition eligibility check process. Okay?

18 So going back, you end up in the Armed Prohibited
19 Persons System after you purchase the firearm, and you're in
20 there as not prohibited.

21 THE COURT: Right.

22 MS. MORALES: If for some reason something happens
23 with you, for example you get arrested, the system, on a -- I
24 want to say on a daily basis -- I believe it is on a daily
25 basis, but I am not sure -- the system checks the people who

1 are within the automated -- or in the Armed Prohibited Persons
2 System against the databases, which I believe are ACHS, Wanted
3 Person, Mental Health Firearm Prohibition System, and also
4 CRPOS.

5 So during that process, if an individual who is not
6 prohibited hits against any of those things, it drops into a
7 queue, and then an individual on the APPS team will review
8 that -- that queue for that individual, or that transaction,
9 and determine if that individual is, in fact, prohibited based
10 on the information that they see.

11 THE COURT: Yes. Got it. Makes sense.

12 MS. MORALES: So it's a completely different process
13 than the -- than the standard check.

14 The standard check utilizes that system to check if
15 they're prohibited or not prohibited. But at that time that
16 the system is checked, it's not, once again, doing -- or it's
17 not requiring an individual to go back and review that
18 information for this individual all over again, that
19 determination has already been done.

20 THE COURT: Yes. Agreed.

21 But the determination has been made --

22 MS. MORALES: Correct.

23 THE COURT: -- on the basis of the fact that APPS is
24 constantly checking these databases, correct?

25 MS. MORALES: Correct.

1 THE COURT: All right. And it is checking those
2 databases on the basis of somebody's name, John Doe, Jill Doe,
3 and whatever other information, I don't know, whether it be
4 date of birth or --

5 MS. MORALES: Age, date of birth, ID, I believe, yes.
6 There's other criteria.

7 THE COURT: Okay. And those are the same criteria
8 that an ammunition purchaser has to give to the vendor in order
9 to have the vendor run the basic check, right?

10 MS. MORALES: For the most part, yes.

11 THE COURT: Okay. And so getting back to my point.

12 My point is that the real difference between the two,
13 the standard and the basic, is that, because the State has not
14 automated the basic background check, it has to send an
15 individual to go check the databases. That's it. That's the
16 sum total difference between the two systems.

17 MS. MORALES: Your Honor, this is Mayra.

18 The different system -- the basic ammunition
19 eligibility check, the individual at the point that submits the
20 application has to undergo that complete background check. So
21 an analyst has to review it.

22 whereas, for the standard -- at that point -- or at
23 that time, which would take -- could take up to two days, three
24 days on average, again, with the caveat -- the caveat that
25 there are some that are automatically approved, and there is no

1 intervention by an actual person.

2 So the difference is, at that point, they're going
3 through the background check, whereas, with the standard
4 ammunition eligibility check, they have already gone through
5 that because they purchased the firearm in the past.

6 THE COURT: Okay. All right. Now, I'm trying to make
7 sure, because I don't want to -- I don't want to miss anything.

8 So what you're saying to me is that when someone goes
9 and applies for a standard background check, the APPS system,
10 by checking these other databases, has already determined
11 whether or not that person is a prohibited person or not.

12 If that person is not a prohibited person, that
13 person's purchase of the ammunition will be approved, they pay
14 \$1, and they get their box of ammunition, and they walk out the
15 door, right?

16 MS. MORALES: If they are not prohibited in APPS and
17 have no criminal record, yes, they would be approved.

18 THE COURT: Okay. On the other hand, they do not have
19 an AFS record, but they do have a name, they have a date of
20 birth, they have a Social Security number, they go into the
21 vendor, they say I want to buy a box of shells, they don't have
22 an AFS record. Because the State does not have an automated
23 system, what happens is that now, an individual goes and checks
24 these databases. If they don't find a hit, they then get back
25 to the vendor and say the sale is approved. If there is a hit,

1 then someone will go and check and try to figure out why
2 there's a hit when it shouldn't be; am I right?

3 MS. MORALES: For the basic ammunition eligibility
4 check, it checks the DMV. And then, if there is -- if -- I
5 check the DMV record -- or the DMV to make sure that there is a
6 record for that individual. It then proceeds to conduct the
7 check against those four databases. If there is no hits, then
8 they would be automatically approved. If there is a hit, then
9 yes, an analyst would then review that information to determine
10 eligibility.

11 THE COURT: And if we were doing a standard background
12 check, and there was a hit, then the APPS system would show the
13 person as being an armed prohibited person, and the sale would
14 not be approved, right?

15 MS. MORALES: Your Honor, for the standard ammunition
16 eligibility check, it would check AFS, check APPS -- check APPS
17 to see if the individual was marked as prohibited or not
18 prohibited. If they're not prohibited, they would be approved.

19 THE COURT: But the reason why they would be
20 prohibited is because, when APPS went and looked at the
21 databases, somewhere in one of those databases there would be a
22 hit, right?

23 MS. MORALES: At some point in the past, yes, an
24 individual would have been in the Armed Prohibited Persons
25 System as not prohibited, something probably happened that

1 could have prohibited them, an analyst or -- requiring an
2 analyst to review the information. The information would be
3 reviewed by the analyst, and then at that point, the individual
4 would make a determination as to whether -- if they're
5 prohibited or not prohibited, and that would be reported in
6 APPS at that point.

7 THE COURT: And if, in fact, the person who was
8 attempting to buy the ammunition disagreed with the fact that
9 that person had been labeled a prohibited person, there would
10 be some due process provided to that individual that that
11 individual could use in order to have his or her good name
12 restored and be deemed to be a not prohibited person, right?

13 MR. RICHARDS: Your Honor, this is Nelson Richards.

14 I believe that's the question that you asked near the
15 outset of the hearing.

16 THE COURT: Yes, I know.

17 MR. RICHARDS: Yes.

18 THE COURT: Yes, it is. But I'm trying to walk my way
19 through this, Mr. Richards, and I'm just trying to make sure
20 that I haven't missed something. So I just wanted to make sure
21 that that was accurate and correct.

22 Okay, listen. I mean, let me check my notes. I think
23 I am pretty well done in more ways than one, if you know what I
24 mean. Just a minute.

25 (Pause in the proceedings)

1 THE COURT: All right. So let me ask, does plaintiff
2 have any comments or anything that I should consider or hear?

3 MR. BRADY: This is Sean Brady, Your Honor, for the
4 plaintiffs.

5 We've covered a lot of material, and I just want to
6 point out, you know, rather than make points on each thing we
7 went over, because we've been here for a while and I don't want
8 to take up everybody's time, unless Your Honor wants my
9 additional thoughts on specifics, but I think that a couple of
10 key points that have been made here, that the fact that the
11 Court has this many questions about this system that operates
12 as a gatekeeper to a fundamental right, I think, is, in and of
13 itself, evidence that this system should not be able to stand
14 as is.

15 It is either a dying storage system, or it's the best
16 the State can do, and in either case, it should not be allowed
17 to operate as a fundamental right -- or as the gatekeeper to a
18 fundamental right.

19 And I understand Your Honor wanting to, and I
20 appreciate Your Honor wanting to get everything squared away,
21 get all the facts right, but I think, based on just the fact
22 that the State can't answer some of the Court's legitimate
23 questions because the system is so confusing, and that there is
24 no -- there is no guidance for individuals, admittedly, I
25 believe. I don't want to put words in Ms. Morales' mouth, but

1 essentially, those who are rejected are left to their own
2 devices to determine how best to chart their course to getting
3 their ammunition.

4 And the numbers that we have not gone over, that are
5 extremely telling, is that the majority of people who are
6 rejected -- not denied, because -- as being prohibited, but
7 rejected because they have some trivial issue with their
8 records that the DOJ keeps, the majority of those people have
9 not gone back to acquire ammunition.

10 That means there is an over 50 percent -- and this is
11 since July. This is a six-month -- it's just from July to
12 January -- over a six-month period, there are still over a
13 50 percent attrition rate of those people who are trying to
14 exercise their fundamental right.

15 (Talking over each other)

16 THE COURT: I'm sorry. Let me interrupt you.

17 How did you arrive at that 50 percent number?

18 MR. BRADY: If you look at Ms. Morales' most recent
19 declaration -- let me pull it up here. I just had it. Oh,
20 okay.

21 So if you go to page -- it's way at the bottom. Okay.
22 So it's page 21 of Ms. Morales' most recent declaration.

23 It says, "Purchasers who were rejected on an AFS check
24 and subsequently purchased ammunition on or before January 1st,
25 2020." If you look in the July column, 9 -- over 9,000 people

1 that were rejected --

2 THE COURT: Okay. I got you.

3 MR. BRADY: And just to be clear here. These are
4 people who are, by definition, not prohibited people.
5 Otherwise, they would have been denied, not rejected. These
6 are people who are entitled to exercise their fundamental right
7 and are being denied merely because of some trivial issue that
8 this system, the current system, does not specify to them how
9 to remedy.

10 It says you either don't have a record or there's an
11 issue with your record. You go figure out -- go to our website
12 and see what may be your issue.

13 And just so we're clear on that specifically, it is my
14 understanding -- I could be wrong, but I'm 95 percent sure
15 about this -- that when you go to -- you're able to remedy any
16 discrepancies in your AFS record online by yourself --
17 right? -- if you go onto the DOJ's website, type in the number
18 they gave you, you are able to, by yourself, fix an AFS record.

19 Let's say, for example, you -- you changed addresses,
20 and you knew that that was the problem. You could then just
21 type in your new address, and the AFS record will be fixed.

22 That said, it is my understanding that the complete
23 back record, to make the change, the individual would need to
24 have their -- their AFS record as currently shown identical to
25 how it's -- to how it's shown. They have to know exactly what

1 their current AFS record says, and they have to plug that in,
2 and then they have to plug in the new updated information that
3 they want changed.

4 So if the person does not have their -- access to
5 their current AFS record, then they are unable to change their
6 AFS record without getting that, so they then would have to
7 request a copy of their AFS record from the California
8 Department of Justice. I believe we have a declaration in
9 our -- to our supplemental brief, plaintiffs do, from a
10 plaintiff who waited over four months for a response from the
11 DOJ as to what his AFS records contained.

12 I just -- I'm so -- while I appreciate the Court's
13 desire to get all the facts straight and lay this whole thing
14 out, I think just at -- at a superficial level and looking at
15 this case, six months out we are on the data, and we're now,
16 you know, nine months out from when it's been implemented, or
17 nine or ten, those facts alone, that there is no -- that
18 there's still over 10 percent of people being rejected for
19 trivial reasons, and even if that was acceptable, that they are
20 getting zero guidance by the State in the system to be able
21 to -- to remedy their situation.

22 And that is demonstrated by the over 50 percent of
23 people who end up just giving up on their fundamental right.
24 That, I think, says enough that this system, as currently
25 constituted, needs to be enjoined now, respectfully.

1 And while the Court -- while the State can go and
2 answer the Court's questions about alternative ways to do this
3 that are less burdensome or -- or explain how somebody could
4 remedy their records and make -- change their system, they --
5 the State can then come back and petition the Court to lift
6 this injunction if this has that -- that information and can
7 make its case for that -- you know, to do that.

8 But as we sit right now, this is a broken system. It
9 hasn't been fixed thus far. It's not going to be fixed. And I
10 don't -- the State should not be entitled to more time without
11 this being enjoined, especially in this environment right now
12 when municipalities are closing gun stores around the State
13 because of the COVID-19 situation. People are unable to get
14 ammunition.

15 And so the State, on one hand, is saying don't go
16 outside. Don't stand in line. Don't go in groups. But, oh,
17 you have to go to a store and sit in line and do a background
18 check.

19 And that also goes for the restriction on shipping
20 ammunition. I think that that has now become an even more
21 severe -- because of what's going on with the COVID-19 epidemic
22 and people being homebound, and municipalities shutting down
23 gun stores, the injury caused by the shipping ban has become
24 more severe, and the need to enjoin it and, you know, join the
25 rest of the country's economy at this time, when we need

1 continuity in the economy and commerce, is even more crucial.

2 So I apologize if I went off on a rant, I just wanted
3 to make a few main points because I think they are critical in
4 understanding that plaintiffs are of the position that, even
5 with all these other questions that the Court legitimately has,
6 just the fact that more than 50 percent of people have given up
7 on their right six months out, it should be enough to condemn
8 this system as unconstitutional. So with that, I'll answer any
9 of the Court's questions.

10 THE COURT: Yes. Go ahead, Mr. Richards.

11 MR. RICHARDS: Yeah. I think there was a lot there,
12 and I'd definitely like an opportunity to respond to it.
13 However, if you have something, I would defer to you.

14 THE COURT: No, no. Go ahead.

15 Make it quick, though, because I think, as Mr. Brady
16 pointed out, we've been at this for quite a while. I'm sure my
17 reporter probably needs a break. So --

18 MR. RICHARDS: I will -- I will endeavor to speak
19 slowly and do it efficiently here.

20 THE COURT: Okay, Mr. Richards.

21 MR. RICHARDS: Again, this is Nelson Richards. Thank
22 you, Your Honor.

23 You know, I think Mr. Brady correctly identified what
24 he just went on, which was a rant. There is a lot of
25 unsubstantiated information there about the affects of the

1 COVID outbreak, there's no evidence in the record, plaintiffs
2 have submitted nothing about that, about people not being able
3 to get ammunition because of the outbreak. There's just an
4 attorney testifying, so I strongly object --

5 THE COURT: Yes. Just a second. Let me interrupt you
6 for just a second.

7 Just -- but don't you think that -- don't you think
8 that the Court could take judicial notice of the fact that --
9 since we are being told to shelter in place, for example? The
10 Governor -- I think the Governor himself has requested social
11 distancing. That's no secret. You would agree the Governor
12 has done that, right? You're not going to dispute that.

13 MR. RICHARDS: Yes, I agree.

14 THE COURT: You agree -- so you would agree that it
15 really does make sense if -- and I know, I've seen reports out
16 there. In fact, I think the Sheriff of Los Angeles decided
17 that gun stores were not essential businesses because people
18 were showing up in gun shops and lining up outside the gun
19 shops to buy guns.

20 Now, people that have never owned guns before, I
21 think, Mr. Richards, I think the State would not be -- I think
22 it would be disingenuous for the State to argue that, at this
23 point in time, there are many, many people out there who feel
24 unsecure and unsafe, which is what's prompting them to go out
25 and buy guns, form lines outside gun stores, and to buy

1 ammunition. I mean, you're not really going to argue with
2 that, are you?

3 MR. RICHARDS: Your Honor, I would agree, the Court
4 can take judicial notice of the Governor's Executive Orders and
5 any special actions taken by government officials at any level
6 of the State.

7 Now, with regard to anything beyond that, I do think
8 that's well beyond the Court's ability to take judicial notice
9 under the rules of evidence. So --

10 THE COURT: Well, let's --

11 MR. RICHARDS: -- with respect to (inaudible).

12 THE COURT: But so, you know, I always tell,
13 particularly young lawyers, you know, there are things that are
14 worth fighting over and things that are not worth fighting
15 over.

16 So the State's not really going to fight with me about
17 the fact that, for example, the Sheriff in Los Angeles County
18 decided that gun shops were not essential businesses and had to
19 close down, and you're not going to fight with me about whether
20 or not people have been, in fact, lining up outside gun stores
21 to buy guns, are you, Mr. Richards?

22 MR. RICHARDS: Your Honor, this is Nelson Richards.

23 With regard to the first question about the actions of
24 the Sheriff, no, I would not. That would fall under the type
25 of thing I think this Court could reasonably take judicial

1 notice of.

2 whether they're lined up by the gun stores or not, you
3 know, I personally -- I maybe have seen a news article where
4 that's happened. I have no way of knowing how prevalent that
5 is, how common that is, whether that was a one-off experience,
6 so I personally don't know, and as a result, I can't sit here
7 and say that it's fine for the Court to take judicial notice to
8 consider that fact without some sort of showing.

9 And so I definitely -- yeah, I would -- this --
10 especially to the extent that that may impact the way that the
11 ammunition law works or the ammunition law's constitutionality.

12 we're very far afield from the challenge the
13 plaintiffs have alleged in their complaint and have pursued in
14 their motion for preliminary injunction.

15 And so we're just so far afield that, in dealing with
16 evidentiary issues and considerations and arguments that just
17 haven't been briefed or raised, that that is a serious concern.

18 THE COURT: So what about this. What about --
19 Mr. Richards, what about this.

20 So the Governor has ordered nonessential businesses to
21 close, ordered people to engage in social distancing.

22 Certainly, as someone of -- you know, as an Officer of the
23 Court, certainly, you would not disagree with the fact that
24 people might be more inclined to buy ammunition online, given
25 that situation, rather than actually showing up face-to-face at

1 a vendor, and providing them with their driver's license, and
2 exchanging things that might possibly potentially carry with it
3 the coronavirus. You're not going to disagree with that, are
4 you, Mr. Richards?

5 MR. RICHARDS: I personally, as a -- you know, may not
6 disagree with that, however, I would strongly object to that
7 being a basis for issuing a preliminary injunction with regard
8 to this law.

9 I mean, whether people feel that way or don't feel
10 that way I don't think should --

11 THE COURT: No.

12 MR. RICHARDS: -- affect whether this Court issues an
13 injunction.

14 THE COURT: Here's my problem with that -- and I'm
15 just going to tell you, I'm going to do what I'm going to do.

16 But, you know, I read the initiative -- when I read
17 the initiative, one of the preambles to the initiative is that
18 we're going to enact, "common sense gun laws".

19 Now, "common sense gun laws" is a term that carries
20 with it no evidentiary weight whatsoever. None. It's a fancy
21 phrase that is used in order to justify doing whatever the
22 State is asking to do. Whether or not that passes muster, I
23 don't know.

24 But all I'm getting at is, so if somehow or another
25 the State is able to use "common sense" to arrive at some of

1 the things that its legislates, explain to me why,
2 Mr. Richards, it is not common sense for me to understand that
3 if the Governor has told people to shelter in place, that gun
4 stores should be closed, and that we have to maintain the
5 social distance, and that in order for me to buy ammo, when I
6 go into a store, in order to get my purchase approved, I have
7 to hand a driver's license, or a passport, or something to the
8 individual, who then has to handle it, who then has to do
9 something with it, who then has to hand it back to me, and that
10 there is a great potential for -- if one of us has the virus,
11 for that to be transmitted, I don't understand why you would
12 want to argue with that. I mean, it just seems like -- I mean,
13 common sense is common sense.

14 Anyway, whatever. I appreciate it. Listen. Again, I
15 thank you all for giving me your time.

16 And I would like to see authority, Mr. Richards, on
17 the state being able to preemptively amend an initiative that
18 has been passed, and approved, and represented to the people as
19 containing certain things, and then what you give with one hand
20 you take away with the other. I'd like to see -- I mean, maybe
21 that is the law, I don't know, but I'd like to see some
22 authority for that.

23 And I'd also like to see from Ms. Morales the appeal
24 process if I apply for a standard background check and I'm
25 rejected, and what the appeal process is if it says, for

1 example, that I am an armed prohibited person, but I'm not.

2 And I don't want to just yield to the State because it
3 is the State, I want to exercise my rights, I want to know what
4 that appeal process is, where do I find it, and I'd like for --
5 Mr. Richards, for you to provide that information to me within
6 the next seven days. Okay?

7 Again, I thank you all for giving me your time.

8 Ms. Morales, I really appreciate your declarations.
9 They're very helpful in helping me get through some of these
10 issues.

11 And with that, this hearing is concluded. Thank you.

12 MR. RICHARDS: Your Honor, this is Nelson Richards, if
13 I may.

14 while I appreciate the Court giving us the opportunity
15 to provide this additional information, given everything that's
16 going on, seven days is going to be a very tight turnaround.

17 Ms. Morales might be the person that we rely on here,
18 but we may need to consult with other staff who may or may not
19 be essential, may or may not be in the office.

20 I personally am not working from the office. I'm on
21 an altered schedule because of child care issues. It's going
22 to make doing it in seven days very difficult.

23 So I'd respectfully ask for at least two weeks on that
24 just because, you know, this is in addition to other work
25 obligations, including a Fifth Circuit brief and a couple of

1 State court appellate briefs, as well.

2 THE COURT: We're going to split the difference. I'll
3 give you ten days.

4 MR. RICHARDS: Thank you, Your Honor.

5 THE COURT: Ten days from now, 5:00 p.m.

6 All right? Great. Thank you.

7 All right. This hearing is concluded. Thank you.

8 (Proceedings conclude at 3:15 p.m.)

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C E R T I F I C A T I O N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

Dated: April 6, 2020, at San Diego, California.

/s/ Ellen L. Simone

Ellen L. Simone, RMR, CRR
Official Court Reporter

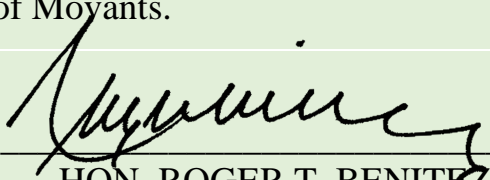
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

<p>KIM RHODE, et al.,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>XAVIER BECERRA, in his official capacity as Attorney General of the State of California,</p> <p style="text-align: right;">Defendant.</p>	<p>Case No.: 18-cv-802-BEN</p> <p>ORDER DENYING LEAVE TO PARTICIPATE AS AMICI CURIAE [Dkt. Nos. 35 and 36]</p>
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Movants Giffords Law Center to Prevent Gun Violence and Brady and Movant Everytown for Gun Safety Fund seek leave to participate in the action as amici curiae. Courts have broad discretion to consider amicus briefs and appoint amicus curiae. In this case the movants seek to assist in the defense of Proposition 63. However, the Defendant Xavier Becerra, in his official capacity as Attorney General of the State of California, is well-equipped to defend the statutes at issue. Therefore, the Court denies the motions of Moyants.

IT IS SO ORDERED.

Dated: April 1, 2020


HON. ROGER T. BENITEZ
United States District Judge

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Xavier Becerra*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

<p>Kim Rhode et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>Xavier Becerra, in his official capacity as Attorney General of the State of California, et al.,</p> <p>Defendants.</p>

3:18-cv-00802-BEN-JLB

**THIRD SUPPLEMENTAL
DECLARATION OF MAYRA G.
MORALES IN SUPPORT OF
DEFENDANT XAVIER
BECERRA'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: 4/27/2018

THIRD SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES

I, MAYRA G. MORALES, declare:

1. I am a Staff Services Manager III for the California Department of Justice, Bureau of Firearms (hereafter generally referred to together as the “Department”). I make this declaration of my own personal knowledge and experience and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. To date, I have prepared three declarations for submission to the Court:

- The August 5, 2019 Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 34-1;
- The September 27, 2019 Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 42; and
- The November 18, 2019 Second Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 48.

3. This third supplemental declaration updates the tables in my November 28 Second Supplemental Declaration for July through October 2019, and adds data for November 2019 through January 2020. To aid in readability, the tables are presented following my signature.

4. Section I of this declaration provides a narrative summary of the information on Basic Ammunition Eligibility Check (which I will refer to as “Basic Checks”) from July 1, 2019, through January 31, 2020. The data underlying this summary appears in Tables 1.1 through 1.3. This declaration adds new entries into Tables 1.2 and 1.3 to show median processing times for Basic Checks.

5. Section II provides a narrative summary of information on Standard Ammunition Eligibility Checks (which I will refer to as “AFS Checks”) for July 1, 2019, through January 31, 2020. The data underlying this summary appears in Tables 2.1 through 2.4. This section contains three noteworthy updates from my November 18 Second Supplemental Declaration. First, the numbers in Table 2.2, which lists the reasons for AFS Check rejections, have been corrected to account for a misallocation of certain rejections in the reported reasons. This misallocation did not affect the total number of rejections or the actual reason for any rejection. Second, I have recently become aware of a potential source of slight discrepancies in the numbers reported in Table 2.2 going forward that I want to bring to the Court’s and parties’ attention now. Third, this declaration adds a new Table 2.4, which lists the weekly AFS Check rejection rate from July 1, 2019, through February 23, 2020.

6. Section III of this declaration updates information about purchasers who had been denied as prohibited, but who, upon additional review, were determined to be not prohibited. The Department has now reviewed a majority of the 770 transactions where a purchaser was denied as prohibited, and it has determined that 16 of those purchasers were in fact eligible.

I. BASIC AMMUNITION ELIGIBILITY CHECK INFORMATION FOR JULY 2019 THROUGH JANUARY 2020

7. The Basic Check is described in California Code of Regulations, title 11, section 4303. This check can be used irrespective of whether a purchaser or transferee (I will generally refer to these together as “purchaser”) can take advantage of one of the other eligibility checks.

8. Under section 4303(b), a Basic Check costs \$19 and entails submitting identifying information, including the purchaser’s name, date of birth, current address, and ID number, to the Department’s Dealer Record of Sale (DROS) Entry System (DES). The process proceeds in two steps. First, the Department

automatically checks the person's ID or driver license number (I will generally refer to IDs and driver licenses as "IDs"), name, and date of birth, against DMV records to confirm the information submitted matches a DMV record and that the ID is valid. If the information matches, then the submitted information is automatically run through four state databases: (1) Automated Criminal History Record System (ACHS); (2) Mental Health Firearms Prohibition System (MHFPS); (3) California Restraining and Protective Order System (CARPOS); and (4) Wanted Persons System (WPS).

9. If a purchaser's information results in no hits in the system, the Basic Check is processed automatically, meaning that Department employees are not directly involved in the process. If the purchaser's information results in a hit in one of the four systems, the eligibility check will require manual review by a Department analyst. A manual review can take anywhere from a few minutes to days or weeks depending on the nature of the hit in the database. For instance, if the ACHS shows the purchaser was charged with a felony, but does not have a disposition of that felony, the manual check would entail tracking down the disposition, which can take at least several business days.

10. Table 1.1 lists the Basic Check approvals, rejections, and denials for July 1, 2019, through January 31, 2020.

11. From July 1, 2019, through January 31, 2020, the Department has processed 19,599 Basic Checks. Of those, 95.3% have been approved and about 1.7% have been rejected because the purchaser's information does not match Department of Motor Vehicle records or the records used to make a determination were incomplete, thereby preventing Department analysts from ascertaining whether the purchaser was prohibited.

12. Over 570 people, or 2.9% of the total processed, have been denied because the Department's records show them to be prohibited persons.

13. Table 1.2 sets forth the average processing times for Basic Checks that were submitted to the Department, by month, from July 2019 through January 2020 that had eligibility determinations made on or before January 31, 2020. As I explained in my November 18 Second Supplemental Declaration, the average processing times for previously reported months tends to increase due to a small number of transactions skewing the average upward. *See* Second Supp. Decl. ¶ 14 & p. 10 n.3, ECF No. 48. These longer transaction times affected the averages for those months. A Basic Check can be delayed for many reasons, most often it is because a Department analyst must conduct additional research on an arrest cycle for a prohibiting event with missing disposition. The Department will do its due diligence to obtain the necessary information. However, if the Department is unable to obtain the information, it will ultimately reject the transaction because an eligibility determination could not be made.

14. For the typical purchaser, the Basic Check processing time takes an average of one to two days. In July, it took 1 day and 17.5 hours for the typical purchaser (though, as discussed in the footnotes to Tables 1.2 and 1.3, the average time is higher). By October, the processing time had decreased to 1 day and 4 hours. The processing times for the typical purchaser in November, December, and January were roughly the same.

15. Another way to assess the experience of ammunition purchasers is to look at the median processing time—the processing time at which 50% of the transactions in the month took less time and 50% took more time. The median will provide additional information on how long the majority of the transactions are actually taking. Table 1.2 now includes the median processing time for Basic Checks. For example, for July Basic Checks all decisions average (mean) time was 73 hours (or 3 days) but the median of those decisions is 27 hours. That gives a sense of how much the outlier cases affect the average.

16. Table 1.3 lists the average processing times for Basic Checks that were approved manually and automatically for the months of July 2019 through January 2020. These numbers are a subset of the Basic Checks that were submitted during those months and that had eligibility determinations made on or before January 31, 2020. This table also lists median processing times.

17. Just under one-quarter of the approved Basic Checks were processed automatically. The average processing time across all seven months was roughly 2 hours.

18. Just over three-quarters of the approved Basic Checks were processed manually. Subject to the observation above that some outliers affected the average, the typical approved Basic Check that is manually processed takes about two business days.

II. AFS CHECK (STANDARD AMMUNITION ELIGIBILITY CHECK) INFORMATION FOR JULY THROUGH JANUARY 2020

19. This section of my declaration provides the information that the Department has collected as of January 31, 2020, regarding AFS Check rejections. The AFS Check is described in more detail in my September 27 Supplemental Declaration. Suppl. Decl. ¶¶ 19-25, 28-31, ECF No. 42. The regulation outlining the AFS Check is located in California Code of Regulations, title 11, section 4302.

20. Section II.A of this declaration provides the data on AFS Checks for July 1, 2019, through January 31, 2020. Section II.B sets forth the reasons for AFS Check rejections in those months. The section also contains two new subsections. Subsection II.B.1 explains a correction to previously reported data on this topic. Subsection II.B.2 discusses small discrepancies in the data reporting the reasons for the rejections (but not the actual reasons themselves) that have arisen, or will likely arise, as that data is re-tabulated over time. Section II.C provides information on purchasers who were rejected in an AFS Check, but who later purchased ammunition on or before January 31, 2020.

A. AFS Check Approvals, Denials, and Rejections for July 2019 Through January 2020

21. Table 2.1 sets forth the AFS Check approvals, denials, and rejections for July 1, 2019 through January 31, 2020. As noted in my September 27 Supplemental Declaration, Suppl. Decl. ¶ 27, ECF No. 42, denials occur when official records identify the purchaser as a prohibited person who cannot lawfully possess a firearm or ammunition. *See also* Second Supp. Decl. ¶ 21, ECF No. 48. Rejections occur when the purchaser's information does not match an AFS record.

22. From July 1, 2019, through January 31, 2020, the Department has processed 616,257 AFS Checks. It has approved 515,022 (83%), rejected 101,047 (16.4%) because the information submitted by the purchaser does not match an AFS entry, and denied 188 (0.03%) because the Department's information shows the purchaser to be on the Armed Prohibited Persons System (APPS) list.

23. The monthly rate of AFS Check rejections is set forth in the following chart:

Month	Rejections as Percent of Total AFS Checks by Month
July 2019	18.8%
August 2019	20.0%
September 2019	17.3%
October 2019	15.6%
November 2019	15.3%
December 2019	14.5%
January 2020	13.2%
February 1 through 23, 2020	13.1%

24. This declaration adds a new Table 2.4 that charts the weekly rejection rate from July 2019 through the week ending February 23, 2020.¹ As the table in the previous paragraph and new Table 2.4 show, the rejection rate has been steadily declining since its high of 20% in August 2019. In some recent weeks, the rate has dipped below 13%.

B. Information on AFS Check Rejections for July 2019 Through January 2020

25. To recap from my September 27 Supplemental Declaration and November 18 Second Supplemental Declaration, AFS Checks are a streamlined eligibility check that rely on the purchaser already having undergone a firearms background check and being subject to inclusion in APPS, in the event they later become prohibited. By definition, an AFS Check will work only for those who have an AFS record, and whose record is up to date. A purchaser without an AFS record, or with an AFS record that is not current, will not be able to obtain an eligibility determination; the system will reject that submission. Suppl. Decl. ¶ 28, ECF No. 42; Second Supp. Decl. ¶ 24, ECF No. 48.

26. It again bears noting that an AFS Check rejection, due to the purchaser's information not matching a record in AFS, is not a determination that the purchaser is ineligible to purchase ammunition. It means that the purchaser cannot avail themselves of that streamlined eligibility check. They may still use a Basic Check, or, in certain situations, a Certificate of Eligibility Verification Check (California Code of Regulations, title 11, section 4305) or Firearms Eligibility Check (California Code of Regulations, title 11, section 4304). *See also* Suppl. Decl. ¶¶ 21-25, ECF No. 42; Second Supp. Decl. ¶ 25, ECF No. 48.

¹ I am able to obtain data on weekly rejection rates quickly, allowing me to provide the rejection rates through the week prior to the filing of this Third Supplemental Declaration. Obtaining data on the reasons for the rejections—the data in Table 2.2 and the following section—takes significantly more time and resources. As a result, I am currently able to report that data only through January 31, 2020.

27. An AFS Check will be rejected if the purchaser's name, address, date of birth, or ID number, or some combination of that information, does not match an AFS record. Suppl. Decl. ¶ 30, ECF No. 42; Second Suppl. Decl. ¶ 26, ECF No. 48.

28. Table 2.2 summarizes the reasons for the AFS Check rejections for July 1, 2019 through January 31, 2020. This revised Table 2.2 corrects the misallocation of some rejections resulting from a prospective ammunition purchaser having transferred the firearm associated with their AFS record or a law enforcement event pertaining to the firearm associated with their AFS records being entered.

1. Correction to previously reported data in Table 2.2.

29. Prior versions of Table 2.2 have listed a category of rejections called "AFS Entry No Longer Valid." Second Suppl. Decl. Table 2.2 at p. 16, ECF No. 48. This rejection occurs because although the purchaser's name, date of birth, ID number, and address match an AFS record, the record is no longer active, usually because the owner has transferred the firearm to someone else. A person with an inactive AFS record cannot use that record to purchase ammunition using an AFS Check because the firearm associated with the inactive record is no longer associated with that individual.

30. When tabulating data for my previous declarations, Department staff have relied on mirrored backups of the AFS database to determine the reason for AFS Check rejections. This approach has avoided potential disruptions to the system (including delays to ammunition transactions) that pulling data from the active system can create. However, using the mirrored backup caused some reporting inaccuracies attributable to the differences between real-time resolution of ammunition transactions in the active system, and the information in the system at the time it was last mirrored.

31. For instance, in my September 27 Supplemental Declaration, the rejection information for the July AFS Checks was taken from a mirror of the AFS

database created in late May 2019. *See* Suppl. Decl. ¶ 34 & Table 2.2, ECF No. 42. Thus, a person who had an active AFS record in late May 2019, when the system was mirrored, but who transferred the firearm associated with that record, making it inactive, before attempting to purchase ammunition in July, would have their transaction rejected. That rejection would have been properly accounted for in the numbers that I reported in Table 2.1. *See* Suppl. Decl. ¶ 26 & Table 2.1, ECF No. 42. But the reported *reason* for that rejection reported in Table 2.2 may not have been accurate because, in the mirrored system, the person had an active AFS record. *See* Suppl. Decl. ¶ 34 & Table 2.2, ECF No. 42. Transactions like the one in the hypothetical were reported largely as “No Identifiable AFS Entry,” though they may have been listed in another category.

32. Table 2.2 in this declaration corrects these misallocated rejections, and now allocates them to a more accurate reason for the rejection. To be clear, the number of rejections reported was accurate and has not changed. Nor does any correction change the actual reason any AFS Check was rejected. It simply corrects how I reported the rejection in my September 27 Supplemental Declaration and November 18 Second Supplemental Declaration.

33. I first became aware of the need for this correction in mid-January, as I was gathering and reviewing data for November and December 2019. Acting as quickly as practicable, I prepared an earlier draft of this declaration, which did not include data for January 2020. That draft was in the process of being finalized for filing on February 14, 2020, when this Court issued an order, ECF No. 52, requesting data through January 2020. Since receiving that order, I have gathered the data for January and incorporated it into this declaration. During this process, I have learned of the potential for slight discrepancies in the reported reasons for AFS Check rejections, which I discuss in the section that follows.

2. Potential for slight discrepancies in data.

34. The systems that the Department uses to tabulate the reasons for rejections are dynamic, not static. New events or entries are added to AFS records on a daily basis. Modifications to AFS records also occur on a daily basis. This means that if, for instance, data sets are run on the reasons for the rejections in July 2019 six different times spread out over a year, they may change slightly because individual AFS records have changed over that time.

35. A hypothetical example shows one way that this could play out: a person has an AFS entry associated with a firearm, and the name, date of birth, and address on their ID all match the AFS record, but the ID number does not match. On August 1, 2019, the person attempts to purchase ammunition using an AFS Check and is rejected because of the ID number. If the Department tabulates data on rejections for August on October 1, 2019, the reason for that rejection would be reported as an “ID number mismatch” in Table 2.2. But if the record is modified to update the ID number on October 15, 2019, and the Department re-tabulates the data on November 1, 2019, the reason for the rejection may be reported differently in a later version of Table 2.2. This difference would not change the fact that the August 1 AFS Check was rejected because of an ID number mismatch.

36. Potential discrepancies like the one in the hypothetical are likely to affect reported reasons for rejections of a small number of transactions.

37. As with the correction described above, the potential for slight discrepancies in the reported reasons for rejections in Table 2.2 does not change the total number of rejections reported in Table 2.1 or the actual reason for any rejection. Nor is it likely to prevent a Department analyst from ascertaining the actual reason for a rejection of a specific transaction. From conferring with the Department’s technical staff, I understand that these discrepancies are simply a byproduct of aggregating and reporting data from a dynamic system.

38. All this is to say that data on the reasons for rejections that I have reported reflect a snapshot that may change slightly over time. Currently, there does not appear to be a way to avoid these minute discrepancies. But because they likely will occur if the Department re-tabulates the numbers again in the future, I am identifying the issue now, so the Court and parties will know the reason for any small discrepancies they may note in my reporting over time.

3. Reasons for AFS Check rejections.

39. Having made these observations, the percentage breakdown of the reasons for the rejections across the seven months from July 2019 through January 2020 remain consistent with what was previously reported. *See* Suppl. Decl. ¶¶ 31-34 & Table 2.2, ECF No. 42 Second Suppl. Decl. ¶¶ 27-33 & Table 2.2, ECF No. 48. Across all seven months, the most common reason AFS Checks were rejected was that the purchaser's address did not match the address in an AFS record. These purchasers' name, ID number, and date of birth matched an entry, but their address did not match an entry. This accounted for about 38% (previously reported as 36%) of the rejections over the four-month period. Second Suppl. Decl. ¶ 28, ECF No. 48.

40. The next most common reason AFS Checks were rejected was that the purchaser could not be associated with an AFS entry at all. In most cases, this likely occurred because either the purchaser or the ammunition vendor mistakenly chose to run an AFS Check where the purchaser did not have an AFS record. This accounted for roughly one-quarter (previously reported as one-third) of all AFS Check rejections. Second Suppl. Decl. ¶ 29, ECF No. 48. For instance, in October, the Department rejected 3,497 AFS Checks, about 26% (previously reported as 4,288 and 32%, respectively) of all 13,498 rejections, for this reason. Second Suppl. Decl. ¶ 29, ECF No. 48.

41. Name mismatches were another significant source of rejections. Across the seven months, about 17% of AFS Checks were rejected for this reason (previously reported as 13%). Second Supp. Decl. ¶ 30, ECF No. 48

42. These three reasons for rejections—address mismatches, no apparent AFS entry, and name mismatches—accounted for about 82% of all rejections. The remaining 18% or so of rejections occurred for various other reasons listed in Table 2.2.

C. Information on Purchasers Rejected in an AFS Check Who Later Purchased Ammunition on or before January 31, 2020

43. At the Court’s request, my September 27 Supplemental Declaration included information on whether purchasers who were rejected in an AFS Check had subsequently purchased ammunition. Suppl. Decl. ¶¶ 36-39, ECF No. 42.

44. Table 2.3 lists information on purchasers who were rejected who later purchased ammunition by month.

45. As explained in my September 27 Supplemental Declaration, there is a difference between the total number of rejections each month and the unique individuals rejected. Suppl. Decl. ¶ 38, ECF No. 42; *see also* Second Supp. Decl. ¶ 34, ECF No. 48. I understand that the primary difference between rejections and denials and unique ID numbers is largely because some individual purchasers attempted to use the AFS Check procedure more than once and were rejected or denied on more than one occasion.

46. In my September 27 Supplemental Declaration, I reported that of the 9,027 unique purchasers rejected in July, 3,468 (38.41%) had purchased ammunition as of August 31, 2019. Suppl. Decl. ¶ 39, Table 2.3, ECF No. 42. By January 31, 2020, 4,295 (47.5%) unique purchasers in July had purchased ammunition. That means that 827 additional people who had an AFS Check rejected in July purchased ammunition between August 31, 2019, and January 31, 2020.

47. A similar trend occurred for the August numbers. In my September 27 Supplemental Declaration, I reported that of the 16,037 unique purchasers rejected in August, 4,923 (30.69%) had purchased ammunition as of August 31, 2019. Suppl. Decl. ¶ 39, Table 2.3, ECF No. 42. By January 31, 2020, that number had increased to 7,276 (45.3%), meaning an additional 2,353 people who had an AFS Check rejected in August purchased ammunition between August 31, 2019, and January 31, 2020.

48. Of the 14,008 individuals who had an AFS Check rejected in September, 6,189 (44.1%) had purchased ammunition by January 31, 2020.

49. Of the 10,896 individuals who had an AFS Check rejected in October, 4,733 (43.4%) had purchased ammunition by January 31, 2020.

50. Of the 11,653 individuals who had an AFS Check rejected in November, 4,976 (42.7%) had purchased ammunition by January 31, 2020.

51. Of the 11,034 individuals who had an AFS Check rejected in December, 4,441 (40.2%) had purchased ammunition by January 31, 2020.

52. And of the 8,457 individuals who had an AFS Check rejected in January, 3,384 (40%) had purchased ammunition by January 31, 2020.

III. PERSONS PREVENTED FROM PURCHASING AMMUNITION AND SUBSEQUENTLY DEEMED ELIGIBLE

53. In my September 27 Supplemental Declaration, I provided information in response to the Court's inquiry about purchasers who had been denied approval to purchase ammunition because they were prohibited, but who were later determined to not be prohibited. Suppl. Decl. ¶ 40, ECF No. 42.

54. I updated that information in my November 18 Second Supplemental Declaration. Second Supp. Decl. ¶¶ 39-42, ECF No. 48. I reported that between July 1 and October 31, 2019, the Department had reviewed over 400 ammunition purchase denials based on the purchaser being prohibited, and that 13 of those

1 purchasers had since been determined to be eligible to purchase ammunition.

2 Second Supp. Decl. ¶ 41, ECF No. 48.

3 55. At this point, the Department has reviewed over 590 of the transactions
4 where the purchaser was denied as prohibited. From July 1, 2019 through January
5 31, 2020, a total of six purchasers were denied on the grounds of a prohibiting
6 offense, mental health commitment, or restraining order, but was, ased on the face
7 of the official records, subsequently determined to have been eligible to purchase
8 ammunition at the time of purchase. A total of ten purchasers who where ineligible
9 to purchase ammunition on the face of their official records, were later determined
10 to be eligible after Department staff investigated the matter.

11 56. To summarize, with over three quarters of the 770 denials from July 1,
12 2019, through January 31, 2020, reviewed, 16 of the purchasers who were denied as
13 prohibited persons have since been determined to be eligible.

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16 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
17 is true and correct.

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19 Executed on: February 28, 2020

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22 MAYRA G. MORALES
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TABLE 1 – BASIC AMMUNITION ELIGIBILITY CHECKS

Table 1.1: Basic Checks — Approvals, Denials, & Rejections as of January 31, 2020²

	July 2019	August 2019	September 2019	October 2019	November 2019	December 2019	January 2020	Total
Basic Checks ³ Received	3,798	5,066	3,213	2,400	1,946	1,908	1,422	19,753
Basic Checks Processed	3,798	5,066	3,213	2,400	1,945	1,889	1,288	19,599
Approved ⁴	3,607	4,852	3056	2,287	1,857	1,796	1,230	18,685
Denied (Prohibited Persons)	119	130	88	76	57	62	40	572
Rejected (no match with DMV records)	22	17	24	10	10	14	10	107
Rejected (incomplete history)	50	67	45	27	21	17	8	235

² This table is based on data available on January 31, 2020, and updates the numbers in Table 1.1 in my November 18 Second Supplemental Declaration, which were based on data available on October 31, 2019. *See* Second Supp. Decl. at p. 9, Table 1.1, ECF No. 48. To provide one example of the change, the earlier table recorded that 60 Basic Check transactions submitted in October 2019 were denied because the purchaser was prohibited. *Id.* As of January 31, 2020, that number increased to 76, meaning that 16 additional Basic Check transactions submitted in October 2019 were denied between October 31, 2019, and January 31, 2020, because the purchaser was prohibited.

³ As of January 31, 2020, 1 (.05%) Basic Check received in November, 19 (.99%) Basic Checks received in December, and 36 (2.5%) Basic Checks received in January, had been delayed. In addition, 98 (6.9%) Basic Checks received in January 2020 had not yet been processed as of January 31, 2020. For example, checks received on January 31, 2020, likely would not have been processed by the time I collected data for this declaration.

⁴ Transactions that were initially denied, but later approved, are treated as approved for purposes of this table.

Table 1.2: Basic Checks — Processing Times as of January 31, 2020

	July 2019	August 2019	September 2019	October 2019	November 2019	December 2019	January 2020
Average Time ⁵	3 days, 1 hr., 30 mins.	2 days, 7 hrs., 59 mins.	1 day, 13 hrs., 51 mins.	2 days, 6 hrs., 2 mins.	2 days, 3 hrs., 40 mins.	1 day, 17 hrs., 12 mins.	1 day, 5 hrs., 16 mins.
Median Time	1 day, 3 hrs., 15 mins.	21 hrs., 39 mins.	14 hrs., 38 mins.	20 hrs., 33 mins.	17 hrs., 53 mins.	14 hrs., 50 mins.	18 hrs., 24 mins.

⁵ As noted in my November 18 Second Supplemental Declaration, not all Basic Check transactions receive a determination in the month the transaction is submitted. *See* Second Supp. Decl. at p. 10, Table 1.2, n.3, ECF No. 48. A small number of transactions each month require a substantial amount of processing time. This relatively small number of transactions significantly increases the average, explaining the longer average processing time for months further in the past.

Table 1.3: Approved Basic Checks — Processing Times

	July 2019	August 2019	September 2019	October 2019	November 2019	December 2019	January 2020
Automatically Processed	811	1,092	713	559	413	437	308
Average Time	2 hrs., 5 mins.	1 hr., 40 mins.	2 hrs., 36 mins	2 hrs., 0 mins.	2 hrs., 30 mins	2 hrs., 1 min.	2 hrs., 11 mins.
Median Time	9 mins.	9 mins.	9 mins.	9 mins.	9 mins.	8 mins.	8 min
Manually Processed	2,796	3,760	2,343	1,728	1,444	1,359	922
Average Time ⁶	2 days, 12 hrs. 29 mins.	2 days, 4 hrs., 3 mins.	1 day, 6 hrs., 54 mins.	2 days, 7 hrs., 39 mins.	1 day, 21 hrs., 39 mins.	1 day, 17 hrs., 47 mins.	1 day, 11 hrs., 47 min.
Median Time	1 day, 23 hrs., 6 min.	1 day, 16 hrs.	16 hrs., 15 mins.	1 day, 3 hrs., 28 mins.	20 hrs., 48 mins.	19 hrs., 39 mins	22 hrs., 26 mins

⁶ For the reasons discussed in footnote 5, some of the average times do not exactly match the times reported in my prior declarations. *See* Second Supp. Decl. at p. 10, Table 1.3, ECF No. 48; Suppl. Decl. at p. 4, Table 1.3, ECF No. 42.

TABLE 2 – AFS CHECKS (STANDARD AMMUNITION ELIGIBILITY CHECKS)

Table 2.1: AFS Checks — Approvals, Denials, & Rejections

	July 2019	August 2019	September 2019	October 2019	November 2019	December 2019	January 2020	Total
AFS Checks Processed	57,553	101,058	100,560	86,376	94,660	95,331	80,719	616,257
Approved	46,702	80,811	83,051	72,847	80,086	81,444	70,081	515,022
Denied (Prohibited Persons)	14	28	28	31	34	30	23	188
Rejected (no match with AFS records)	10,837	20,219	17,481	13,498	14,540	13,857	10,615	101,047

Table 2.2: AFS Checks — Reasons for Rejections as of January 31, 2020

	July 2019		August 2019		September 2019		October 2019		November 2019		December 2019		January 2020	
Total Rejected	10,837		20,219		17,481		13,498		14,540		13,857		10,615	
Address Mismatch (name, date of birth, and ID number match)	4,256	39.27%	7,398	36.59%	6,706	38.36%	5,213	38.62%	5,681	39.07%	5,351	38.62%	4,253	40.07%
No Identifiable AFS Entry (purchaser not eligible for AFS Check)	2,900	26.76%	5,906	29.21%	4,859	27.80%	3,497	25.91%	3,805	26.17%	3,368	24.31%	2,350	22.14%
Name Mismatch (date of birth, address, and ID number match)	1,693	15.62%	2,984	14.76%	2,703	15.46%	2,295	17.00%	2,667	18.34%	2,597	18.74%	2,148	20.24%

Table 2.2: AFS Checks — Reasons for Rejections as of January 31, 2020

	July 2019		August 2019		September 2019		October 2019		November 2019		December 2019		January 2020	
Name and ID Number Mismatch (date of birth and address match)	373	3.44%	726	3.59%	607	3.47%	448	3.32%	448	3.08%	415	2.99%	281	2.65%
AFS Entry No Longer Valid (Name, Date of Birth, ID Number, and Address Match)	339	3.13%	606	3.00%	493	2.82%	393	2.91%	411	2.83%	472	3.41%	338	3.18%
Name and Address Mismatch (date of birth and ID number match)	278	2.57%	624	3.09%	594	3.40%	461	3.42%	452	3.11%	495	3.57%	353	3.33%

Table 2.2: AFS Checks — Reasons for Rejections as of January 31, 2020

	July 2019		August 2019		September 2019		October 2019		November 2019		December 2019		January 2020	
AFS Entry No Longer Valid (Partially Matched on a combination of Name, Date of Birth, ID, Address)	277	2.56%	541	2.68%	444	2.54%	329	2.44%	292	2.01%	297	2.14%	226	2.13%
ID Number and Address Mismatch (name and date of birth match)	245	2.26%	493	2.44%	370	2.12%	289	2.14%	225	1.55%	259	1.87%	187	1.76%
ID Number Mismatch (name, date of birth, and address match)	216	1.99%	415	2.05%	333	1.90%	266	1.97%	256	1.76%	274	1.98%	204	1.92%

Table 2.2: AFS Checks — Reasons for Rejections as of January 31, 2020

	July 2019		August 2019		September 2019		October 2019		November 2019		December 2019		January 2020	
Date of Birth Mismatch (name, address, and ID number match)	169	1.56%	290	1.43%	221	1.26%	185	1.37%	214	1.47%	213	1.54%	185	1.74%
Date of Birth and ID Number Mismatch (name and address match)	36	0.33%	121	0.60%	66	0.38%	57	0.42%	45	0.31%	76	0.55%	44	.41%
Date of Birth and Address Mismatch (name and ID number match)	33	0.30%	64	0.32%	41	0.23%	41	0.30%	15	0.10%	18	0.13%	22	.21%

Table 2.2: AFS Checks — Reasons for Rejections as of January 31, 2020

	July 2019		August 2019		September 2019		October 2019		November 2019		December 2019		January 2020	
Name and Date of Birth Mismatch (address and ID number match)	18	0.17%	27	0.13%	18	0.10%	18	0.13%	22	0.15%	17	0.12%	15	.14%
Name, Date of Birth, and Address Mismatch (ID number match)	4	0.04%	24	0.12%	26	0.15%	6	0.04%	7	0.05%	5	0.04%	9	.08%

Table 2.3: Purchasers Who were Rejected on an AFS Check and Subsequently Purchased Ammunition on or before January 31, 2020							
	July 2019	August 2019	September 2019	October 2019	November 2019	December 2019	January 2020
Individuals Rejected in AFS Checks	9,027	16,037	14,008	10,896	11,653	11,034	8,457
Number Who Purchased Ammunition on or before January 31, 2020, after an AFS Check Rejection	4,295 ⁷	7,276 ⁸	6,189 ⁹	4,733 ¹⁰	4,976	4,441	3,384

⁷ As of August 31, 2019, this number was 3,468. *See* Supp. Decl. at p. 11, Table 2.3, ECF No. 42. The difference between that number and the number in this table means that 827 additional people who received an AFS Check rejection in July 2019 were able to purchase ammunition using some form of eligibility check between August 31, 2019, and January 31, 2020.

⁸ As of August 31, 2019, this number was 4,923. *See* Supp. Decl. at p. 11, Table 2.3, ECF No. 42. The difference between that number and the number in this table means that 2,353 additional people who received an AFS Check rejection in August 2019 were able to purchase ammunition using some form of eligibility check between August 31, 2019, and January 31, 2020.

⁹ As of October 31, 2019, this number was 5,371. *See* Second Supp. Decl. at p. 19, Table 2.3, ECF No. 48. The difference between that number and the number in this table means that 818 additional people who received an AFS Check rejection in September 2019 were able to purchase ammunition using some form of eligibility check between October 31, 2019, and January 31, 2020.

¹⁰ As of October 31, 2019, this number was 3,580. *See* Second Supp. Decl. at p. 19, Table 2.3, ECF No. 48. The difference between that number and the number in this table means that 1,153 additional people who received an AFS Check rejection in October 2019 were able to purchase ammunition using some form of eligibility check between October 31, 2019, and January 31, 2020.

Table 2.4: AFS Check Rejection Rate by Week – July 1, 2019, through February 23, 2020			
Week	Total AFS Checks Submitted	AFS Check Rejections	Percent
July 1-7, 2019	11,269	1,990	17.66%
July 8- 14, 2019	12,918	2,305	17.84%
July 15-21, 2019	14,199	2,763	19.46%
July 22-28, 2019	13,859	2,725	19.66%
July 29 – August 4, 2019	16,423	3,282	19.98%
August 5-11, 2019	18,634	3,805	20.42%
August 12-18, 2019	20,597	4,212	20.45%
August 19-25, 2019	22,143	4,279	19.32%
August 26 – September 1, 2019	31,781	6,358	20.01%
September 2-8, 2019	25,872	4,719	18.24%
September 9-15, 2019	23,775	4,143	17.43%
September 16-22, 2019	23,413	3,931	16.79%
September 23-29, 2019	22,008	3,678	16.71%
September 30 – October 6, 2019	21,431	3,334	15.56%
October 7-13, 2019	19,479	3,149	16.17%
October 14-20, 2019	21,567	3,308	15.34%
October 21-27, 2019	18,436	2,872	15.58%

Table 2.4: AFS Check Rejection Rate by Week – July 1, 2019, through February 23, 2020

Week	Total AFS Checks Submitted	AFS Check Rejections	Percent
October 28 – November 3, 2019	17,394	2,789	16.03%
November 4-10, 2019	22,027	3,504	15.91%
November 11-17, 2019	21,005	3,221	15.33%
November 18-24, 2019	19,004	2,902	15.27%
November 25 – December 1, 2019	25,823	3,797	14.70%
December 2-8, 2019	17,542	2,577	14.69%
December 9-15, 2019	22,557	3,268	14.49%
December 16-22, 2019	22,855	3,258	14.26%
December 23-29, 2019	22,878	3,295	14.40%
December 30, 2019 – January 5, 2020	21,538	2,991	13.89%
January 6-12, 2020	18,365	2,424	13.20%
January 13-19, 2020	19,106	2,545	13.32%
January 20-26, 2020	18,142	2,317	12.77%
January 27 – February 2, 2020	15,386	1,986	12.91%
February 3-9, 2020	18,262	2,327	12.74%

Table 2.4: AFS Check Rejection Rate by Week – July 1, 2019, through February 23, 2020			
Week	Total AFS Checks Submitted	AFS Check Rejections	Percent
February 10-16, 2020	18,283	2,405	13.15%
February 17-23, 2020	17,848	2,377	13.32%
Total	675,819	108,836	16.10%

CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra** No. 3:18-cv-00802- BEN-JLB

I hereby certify that on February 28, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**THIRD SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES IN SUPPORT
OF DEFENDANT XAVIER BECERRA’S OPPOSITION TO PLAINTIFFS’ MOTION
FOR PRELIMINARY INJUNCTION**

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 February 28, 2020, at Sacramento, California.

Tracie L. Campbell
Declarant

/s/ Tracie Campbell
Signature

SA2018101286

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,

Plaintiffs,

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

Defendant.

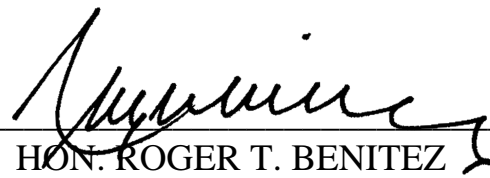
Case No.: 18-cv-802-BEN (JLB)

ORDER

Defendant Attorney General Xavier Becerra is ordered to update the Court and parties on the statewide results of ammunition sales background checks for the months of November 2019, December 2019, and January 2020. The updated information shall be filed **on or before March 13, 2020** and shall be produced in a format similar to the report previously filed as the Second Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction (filed Nov. 18, 2019).

IT IS SO ORDERED.

Date: February 14, 2020



HON. ROGER T. BENITEZ
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,

Plaintiffs,

v.

XAVIER BECERRA,

Defendant.

Case No.: 18-cv-00802-BEN-JLB

ORDER:

**(1) GRANTING JOINT MOTION TO
VACATE MANDATORY
SETTLEMENT CONFERENCE;
AND**

**(2) VACATING MANDATORY
SETTLEMENT CONFERENCE**

[ECF Nos. 49; 50]


Before the Court is the parties' Joint Motion to Vacate the Mandatory Settlement Conference. (ECF No. 50.) The parties represent that they "have discussed the possibility of settlement and do not believe this case has any chance of settling." (*Id.* at 1.) The sole issue in this case is the constitutionality of California gun control legislation. Plaintiffs represent that they "have no intention of dismissing this lawsuit unless Defendant ceases enforcement of the challenged provisions." (*Id.* at 2.) Defendant maintains that "the challenged provisions are constitutional and duly enacted." (*Id.*) Defendant posits that "[g]iven the Attorney General's sworn duty to uphold the laws of the State, the Attorney

General cannot excuse Plaintiffs from compliance with the challenged provisions or otherwise refuse to enforce them.” (*Id.* (citing Cal. Const. art. III, § 3.5).) As such, the Court finds that holding a Mandatory Settlement Conference (“MSC”) would be a waste of resources for the parties and the Court with no practical possibility of settlement.

Accordingly, for good cause shown, the Court hereby **GRANTS** the parties’ joint motion and **VACATES** the February 21, 2020 MSC. The Court will reschedule the MSC if directed to do so by Judge Benitez. *See* CivLR 16.1.d.4. Further, the Court may reschedule the MSC upon request of any party.

IT IS SO ORDERED.

Dated: January 16, 2020


Hon. Jill L. Burkhardt
United States Magistrate Judge

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Matthew D. Cubeiro – SBN 291519
MICHEL & ASSOCIATES, P.C.
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Long Beach, CA 90802
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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**JOINT MOTION TO VACATE THE
MANDATORY SETTLEMENT
CONFERENCE**

Plaintiffs Kim Rhode, Gary Brennan, Cory Henry, Edward Johnson, Scott Lindemuth, Richard Ricks, Denise Welvang, Able's Sporting, Inc., a Texas corporation, AMDEP Holdings, LLC, a Florida limited liability company d/b/a Ammunition Depot, R&S Firearms, Inc., an Arizona corporation d/b/a Sam's Shooters' Emporium, and California Rifle & Pistol Association, Incorporated, a California corporation ("Plaintiffs"), and Defendant Xavier Becerra ("Defendant") through their counsel, hereby jointly request that the Court vacate the Mandatory Settlement Conference currently set for February 21, 2020.

The parties have discussed the possibility of settlement and do not believe this case has any potential of settling. Plaintiffs believe that the challenged provisions violate various constitutional rights, and Defendant believes the law is constitutional.

Plaintiffs have no intention of dismissing this lawsuit unless Defendant ceases enforcement of the challenged provisions.

It is Defendant's position that the challenged provisions are constitutional and duly enacted. Given the Attorney General's sworn duty to uphold the laws of the State, the Attorney General cannot excuse Plaintiffs from compliance with the challenged provisions or otherwise refuse to enforce them. Cal. Const., art. III, § 3.5.

Additionally, the Parties have not completed discovery in this matter. The discovery cut off was suspended by Judge Benitez at the Status Conference on October 1, 2019 (see Exhibit 1, 45:22-46:2, relevant pages of Transcript of Status Conference). The parties are currently awaiting an order regarding setting a new scheduling order, see Exhibit 2, Joint Status Report and Proposed Order requesting to vacate the current Scheduling Order.

For these reasons, settlement of this matter is practically impossible. The parties thus respectfully request to be relieved from the Mandatory Settlement Conference and its related requirements and that the hearing in chambers currently scheduled for February 21, 2020 be taken off calendar.

Should the Court not relieve the parties from the Mandatory Settlement Conference, they respectfully request in the alternative that their counsel be allowed to attend the Mandatory Settlement Conference telephonically, rather than in person, to avoid the significant costs of appearing in person when the outcome is known.

Dated: January 15, 2020

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Email: sbrady@michellawyers.com
Attorneys for Plaintiffs

///

///

Dated: January 15, 2020

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

s/ Nelson R. Richards
NELSON R. RICHARDS
Deputy Attorney General
Email: Nelson.Richards@doj.ca.gov
Attorneys for Defendant

The below filer attests that concurrence in the filing of this document has been obtained from the above signatories.

s/ Sean A. Brady
Sean A. Brady

EXHIBIT 1

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
3

4 KIM RHODE, et al.,)
5 Plaintiffs,) No. 18-CV-00802-BEN-JLB
6 v.) October 1, 2019
7 XAVIER BECERRA, et al.,) 1:05 p.m.
8 Defendants.) San Diego, California
9

10 TRANSCRIPT OF STATUS CONFERENCE
11 BEFORE THE HONORABLE ROGER T. BENITEZ
12 UNITED STATES DISTRICT JUDGE

12 APPEARANCES (Telephonic):

13 For the Plaintiffs: MICHEL & ASSOCIATES, P.C.
14 By: SEAN BRADY, ESQ.
15 180 East Ocean Boulevard
Suite 200
Long Beach, California 90802

16 For the Defendants: CALIFORNIA ATTORNEY GENERAL'S OFFICE
17 By: NELSON RICHARDS, ESQ.
2550 Mariposa Mall
Room 5090
18 Fresno, California 93721

19
20 Court Reporter: CYNTHIA R. OTT, RDR, CRR
21 District Court Clerk's Office
333 West Broadway, Suite 420
22 San Diego, California, 92101
cynthia_ott@casd.uscourts.gov

23
24
25 Reported by Stenotype, Transcribed by Computer

1 get another round of information that could necessitate, you
2 know, deposing the same people a second time.

3 You know, I think it would be easier, more streamlined
4 for everybody, rather than, for example, you know, deposing
5 Ms. Morales now, based on this declaration, and then, you know,
6 having to recall her once we see the second round of
7 information, because there could be discrepancies, right, that
8 we want to ask about.

9 So I think it makes sense to kick it out past that.

10 THE COURT: Well, I agree with you in a sense, except
11 for, of course, this is sort of a rolling dataset. And so I
12 don't know that there would ever come a time when we would
13 really have the final data that we would be working with.

14 So I guess what I'm saying is there's going to come a
15 point where, for example, with interrogatories, you're going to
16 have to send the interrogatories out, and then we're going to
17 have to expect that there will be supplemental responses to the
18 original responses. And then, of course, it may be possible
19 that we do need to go a second round of depositions. Not in
20 all cases, but in some cases, there may be a second round of
21 depositions that's necessary.

22 But I hear you. I understand what you're saying. And
23 you're right, the current discovery date may be unrealistic.
24 So why don't I just cut that off, and let's -- let's think
25 about this when we have our next status conference. If maybe

1 the two of you can meet and confer and give me dates by when we
2 can -- you know, for discovery cutoffs, experts and so on.

3 I would like to have the evidentiary hearing on this
4 when everybody is reasonably well prepared. So I think it
5 would be a good idea to have most of the discovery done before
6 we do our hearing on the preliminary injunction.

7 So, I'll suspend the discovery cutoff date for now.
8 And then I want you to have a schedule for me, an agreed upon
9 schedule for me next time we talk, which will be sometime
10 probably in late November, okay? Agreed?

11 MR. BRADY: Perfect, Your Honor. Thank you very much.

12 MR. RICHARDS: This is Nelson Richards, Your Honor.
13 Thank you. We agree to that.

14 THE COURT: Thank you. All right. This hearing is
15 concluded.

16 (The proceedings concluded at 2:20 p.m., October 1, 2019.)
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1 COURT REPORTER'S CERTIFICATE

2
3 I, CYNTHIA R. OTT, Official Court Reporter, United States
4 District Court, Southern District of California, do hereby
5 certify that pursuant to 28 U.S.C. §753 the foregoing is a
6 true, complete and correct transcript of the stenographically
7 reported proceedings had in connection with the above-entitled
8 matter and that the transcript page format is in conformance
9 with the regulations of the Judicial Conference of the United
10 States.

11 DATED at San Diego, California, October 22, 2019.
12
13

14 /s/ CYNTHIA R. OTT
15 CYNTHIA R. OTT, RDR, CRR
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21
22
23
24
25

EXHIBIT 2

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Matthew D. Cubeiro – SBN 291519
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180 E. Ocean Boulevard, Suite 200
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

JOINT STATUS REPORT

BACKGROUND

On October 1, 2019, the parties participated in a telephonic status conference, during which the Court suspended the existing discovery cut-off dates and instructed counsel for the parties to meet and confer to develop agreed upon dates for new discovery deadlines to propose to the Court. Tr. of Proceedings at 45:22-46:1-2, 46:7-13, Oct. 1, 2019. The Court indicated it would hold another status conference sometime in late November and also suggested that it might hold an evidentiary hearing before ruling on Plaintiffs' Motion for Preliminary Injunction. Tr. of Proceedings at 43:15-17, 46:7-10, Oct. 1, 2019. The Court also invited Plaintiffs to file a supplemental brief, which they did on October 29, 2019. (ECF No. 46).

JOINT STATUS REPORT & REQUESTS

Counsel for the parties have met and conferred and, based thereon, jointly and respectfully request the following from the Court:

- 1) That no evidentiary hearing take place prior to the Court ruling on Plaintiffs' Motion for Preliminary Injunction, due not only to the significant costs and time required to hold one, and the potential redundancy of the merits stage, but also because the parties agree that the material facts are generally undisputed and that counsel should be able to address most, if not all, of the Court's questions about the issues currently before the Court sufficient to decide the pending motion;
- 2) That the Court grant Defendant an opportunity to respond to Plaintiffs' supplemental brief, either via a written brief not to exceed 10 pages to be filed within 14 days of the Court's response to this Joint Status Report, or at a hearing with counsel for all parties present to take place on the first convenient date for the Court (but excluding November 22, 25 and December 2, 4, 5, 2019);
- 3) That the Court allow the parties to wait until after the Court rules on Plaintiffs' Motion for Preliminary Injunction to meet and confer and finalize their stipulation concerning all new discovery deadlines at that time, because the parties believe that awaiting a ruling from the Court on the pending motion would likely add clarity to the issues that would facilitate the parties agreeing upon a case schedule going forward.

Dated: November 7, 2019

Respectfully submitted,
MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Email: sbrady@michellawyers.com
Attorneys for Plaintiffs

Dated: November 7, 2019

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

s/ Nelson R. Richards
NELSON R. RICHARDS
Email: nelson.richards@doj.ca.gov
Attorneys for Defendant

Attestation of Concurrence in Filing

I, Sean A. Brady, am the ECF user whose ID and password are being used to file the foregoing Joint Status Report. I hereby attest that all signatories listed above, and on whose behalf this filing is submitted, concur in the filings content and have authorized the filing.

Dated: November 7, 2019

s/ Sean A. Brady
Sean A. Brady

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

JOINT STATUS REPORT

on the following parties by electronically filing the foregoing on November 7, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 7, 2019, at Long Beach, CA.

s/ Laura Palmerin
Laura Palmerin

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**ORDER REGARDING JOINT STATUS
REPORT**

The Court, having reviewed the parties' joint status report filed on November 7, 2019 (docket number 47) and good cause appearing, hereby ORDERS as follows:

1) That counsel for all parties appear for a hearing regarding the supplemental filings relating to Plaintiffs' Motion for Preliminary Injunction, to take place:

_____;

2) All discovery and pretrial deadlines set forth in the Amended Scheduling Order (docket number 27) are vacated. The parties must meet and confer and file a stipulation requesting a new scheduling order with proposed deadlines no later than thirty (30) days from the date of a ruling on Plaintiffs' Motion for Preliminary Injunction.

IT IS SO ORDERED.

Dated: _____

Hon. Roger T. Benitez
United States District Judge

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**JOINT MOTION TO VACATE THE
MANDATORY SETTLEMENT CONFERENCE**

on the following parties by electronically filing the foregoing on January 15, 2020, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 2020, at Long Beach, CA.

s/ *Laura Palmerin*
Laura Palmerin

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
NOREEN P. SKELLY
Deputy Attorney General
NELSON R. RICHARDS
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E-mail: Nelson.Richards@doj.ca.gov
*Attorneys for Defendant Attorney General
Xavier Becerra*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Kim Rhode et al.,

Plaintiffs,

v.

**Xavier Becerra, in his official capacity
as Attorney General of the State of
California, et al.,**

Defendants.

3:18-cv-00802-BEN-JLB

**SECOND SUPPLEMENTAL
DECLARATION OF MAYRA G.
MORALES IN SUPPORT OF
DEFENDANT XAVIER
BECERRA'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: 4/27/2018

SECOND SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES

I, MAYRA G. MORALES, declare:

1. I am a Staff Services Manager III for the California Department of Justice, Bureau of Firearms (hereafter generally referred to together as the “Department”). I make this declaration of my own personal knowledge and experience and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I understand that at an October 1, 2019 status conference relating to Plaintiffs’ motion for preliminary injunction, the Court requested additional information from the Attorney General. I have reviewed pages 41 through 43 of the transcript of the status conference. Based on that review, I see that the Court requested the same information provided in my September 27 Supplemental Declaration (Supp. Decl.), ECF No. 42, updated through the end of October of 2019.

3. As part of my job duties, I can request data from the Department’s Application Development Bureau regarding ammunition eligibility transactions. I have obtained the data that the Court requested.

4. This declaration updates the tables in my September 27 Supplemental Declaration for July and August and adds information for September and October. To aid in readability, the tables are presented following my signature.

5. Section I of this declaration provides a narrative summary of the information on Basic Ammunition Eligibility Check (which I will refer to as “Basic Checks”) from July 1, 2019, through October 31, 2019. The data underlying this summary appears in Tables 1.1 through 1.3.

6. Section II provides a narrative summary of information on AFS Checks for July 1, 2019, through October 31, 2019. The data underlying this summary appears in Tables 2.1 through 2.3.

7. Section III of this declaration updates information about purchasers who had been denied as prohibited, but who, upon additional review, were determined to be not prohibited. The Department has now reviewed a majority of the 504 transactions where a purchaser was denied as prohibited, and it has determined that 13 of those purchasers were in fact eligible.

I. BASIC AMMUNITION ELIGIBILITY CHECK INFORMATION FOR JULY THROUGH OCTOBER 2019

8. The Basic Check is described in California Code of Regulations, title 11, section 4303. This check can be used irrespective of whether a purchaser or transferee (I will generally refer to these together as “purchaser”) can take advantage of one of the other eligibility checks.

9. Under section 4303(b), a Basic Check costs \$19 and entails submitting identifying information, including the purchaser’s name, date of birth, current address, and ID number, to the Department’s Dealer Record of Sale (DROS) Entry System (DES). The process proceeds in two steps. First, the Department automatically checks the person’s ID or driver license number (I will generally refer to IDs and driver licenses as “IDs”), name, and date of birth, against DMV records to confirm the information submitted matches a DMV record and that the ID is valid. If the information matches, then the submitted information is automatically run through four state databases: (1) Automated Criminal History Record System (ACHS); (2) Mental Health Firearms Prohibition System (MHFPS); (3) California Restraining and Protective Order System (CARPOS); and (4) Wanted Persons System (WPS).

10. If a purchaser’s information results in no hits in the system, the Basic Check is processed automatically, meaning that Department employees are not directly involved in the process. If the purchaser’s information results in a hit in one of the four systems, the eligibility check will require manual review by a Department analyst. A manual review can take anywhere from a few minutes to

days or weeks depending on the nature of the hit in the database. For instance, if the ACHS shows the purchaser was charged with a felony, but does not have a disposition of that felony, the manual check would entail tracking down the disposition, which can take at least several business days.

11. Table 1.1 lists the Basic Check approvals, rejections, and denials for July 1, 2019, through October 31, 2019.

12. From July 1, 2019, through October 31, 2019, the Department has processed 14,331 Basic Checks. Of those, 95% have been approved and about 1.65% have been rejected because the purchaser's information does not match Department of Motor Vehicle records or the records used to make a determination were incomplete, thereby preventing Department analysts from ascertaining whether the purchaser was prohibited.

13. Almost 400 people, or 2.8% of the total processed, have been denied because the Department's records show them to be prohibited persons.

14. Table 1.2 sets forth the average processing times for Basic Checks that were submitted in July through October that had eligibility determinations made on or before October 31, 2019. The average processing times for July and August have increased since my September 27 Supplemental Declaration because a small number of transactions—6.9% of the total—were still pending on August 31, but had been resolved by October 31. These longer transaction times affected the averages for those months. A Basic Check can be delayed for many reasons, most often it is because a Department analyst must conduct additional research on an arrest cycle for a prohibiting event with missing disposition. The Department will do its due diligence to obtain the necessary information. However, if the Department is unable to obtain the information, it will ultimately reject the transaction because an eligibility determination could not be made.

15. For the typical purchaser, the Basic Check processing time takes an average of one to two days. In July, it took 1 day and 17.5 hours for the typical

purchaser (though, as discussed in the footnotes to Tables 1.2 and 1.3, the average time is higher). By October, the processing time had decreased to 1 day and 4 hours.

16. Table 1.3 lists the average processing times for Basic Checks that were manually and automatically approved for the months of July through October. These numbers are a subset of the Basic Checks that were submitted during those months and that had eligibility determinations made on or before October 31, 2019.

17. Just under one-quarter of the approved Basic Checks were processed automatically. The average processing time across all four months was roughly 2 hours.

18. Just over three-quarters of the approved Basic Checks were processed manually. Subject to the observation above that some outliers affected the average, the typical approved Basic Check that is manually processed takes about two business days.

II. AFS CHECK (STANDARD AMMUNITION ELIGIBILITY CHECK) INFORMATION FOR JULY THROUGH OCTOBER 2019

19. This section of my declaration provides the information that the Department has collected as of October 31, 2019, regarding AFS Check rejections. The AFS Check is described in more detail in my September 27 Supplemental Declaration. Suppl. Decl. ¶¶ 19-25, 28-31, ECF No. 42. The regulation outlining the AFS Check is located in California Code of Regulations, title 11, section 4302.

20. Section II.A of this declaration provides the data on AFS Checks for July 1, 2019, through October 31, 2019. Section II.B sets forth the reasons for AFS Check rejections in those months. Section II.C provides information on purchasers who were rejected in an AFS Check, but who later purchased ammunition on or before October 31, 2019.

A. AFS Check Approvals, Denials, and Rejections for July Through October 2019

21. Table 2.1 sets forth the AFS Check approvals, denials, and rejections for July 1, 2019 through October 31, 2019. As noted in September 27 Supplemental Declaration, Suppl. Decl. ¶ 27, ECF No. 42, denials occur when official records identify the purchaser as a prohibited person who cannot lawfully possess a firearm or ammunition. Rejections occur when the purchaser's information does not match an AFS record.

22. Since July 1, 2019, the Department has processed 345,547 AFS Checks. It has approved 283,411 (82%), rejected 62,035 (18%) because the information submitted by the purchaser does not match an AFS entry, and denied 101 (0.03%) because the Department's information shows the purchaser to be on the Armed Prohibited Persons System (APPS) list.

23. The monthly rate of AFS Check rejections was 18.8% in July, increased to 20% in August, and has since decreased to 17% in September and 15.6% in October. The Department expects this downward trend to continue as familiarity with the system among ammunition vendors and consumers increases. The reasons for the rejections in July through October 2019 are set forth in more detail in the following section.

B. Information on AFS Check Rejections for July Through October 2019

24. To recap from my September 27 Supplemental Declaration, AFS Checks are a streamlined eligibility check that rely on the purchaser already having undergone a firearms background check and being subject to inclusion in APPS, in the event they later become prohibited. By definition, an AFS Check will work only for those who have an AFS record, and whose record is up to date. A purchaser without an AFS record, or with an AFS record that is not current, will not

be able to obtain an eligibility determination; the system will reject that submission. Suppl. Decl. ¶¶ 28, ECF No. 42.

25. At the outset, it bears noting that an AFS Check rejection, due to the purchaser's information not matching a record in AFS, is not a determination that the purchaser is ineligible to purchase ammunition. It means that the purchaser cannot avail themselves of that streamlined eligibility check. They may still use a Basic Check, or, in certain situations, a Certificate of Eligibility Verification (California Code of Regulations, title 11, section 4305) or Firearms Eligibility Check (California Code of Regulations, title 11, section 4304). *See also* Suppl. Decl. ¶¶ 21-25, ECF No. 42.

26. An AFS Check will be rejected if the purchaser's name, address, date of birth, or ID number, or some combination of that information, does not match an AFS record. Suppl. Decl. ¶ 30, ECF No. 42.

27. Table 2.2 summarizes the reasons for the AFS Check rejections for July 1, 2019 through October 31, 2019.

28. Across all four months, the most common reason AFS Checks were rejected was that the purchaser's address did not match the address in an AFS record. These purchasers' name, ID number, and date of birth matched an entry, but their address did not match an entry. This accounted for about 36% of the rejections over the four-month period.

29. The next most common reason AFS Checks were rejected was that the purchaser could not be associated with an AFS entry at all. In most cases, this likely occurred because either the purchaser or the ammunition vendor mistakenly chose to run an AFS Check where the purchaser did not have an AFS record. This accounted for roughly one-third of all AFS Check rejections. For instance, in October, the Department rejected 4,288 AFS Checks, about 32% of all 13,498 rejections, for this reason.

30. Name mismatches were another significant source of rejections. Across the four months, about 13% of AFS Checks were rejected for this reason.

31. These three reasons for rejections—address mismatches, no apparent AFS entry, and name mismatches—accounted for about 80% of all rejections. The remaining 20% or so of rejections occurred for various other reasons listed in Table 2.2.

C. Information on Purchasers Rejected in an AFS Check Who Later Purchased Ammunition on or before October 31, 2019

32. At the Court's request, my September 27 Supplemental Declaration included information on whether purchasers who were rejected in an AFS Check had subsequently purchased ammunition. Suppl. Decl. ¶¶ 36-39, ECF No. 42.

33. Table 2.3 lists information on purchasers who were rejected who later purchased ammunition by month.

34. As explained in my September 27 Supplemental Declaration, there is a difference between the total number of rejections each month and the unique individuals rejected. Suppl. Decl. ¶ 38, ECF No. 42. I understand that the primary difference between rejections and denials and unique ID numbers is largely because some individual purchasers attempted to use the AFS Check procedure more than once and were rejected or denied on more than one occasion.

35. In my September 27 Supplemental Declaration, I reported that of the 9,027 unique purchasers rejected in July, 3,468 (38.41%) had purchased ammunition as of August 31, 2019. Suppl. Decl. ¶ 39, Table 2.3, ECF No. 42. By October 31, 2019, 3,950 (43.75%) unique purchasers in July had purchased ammunition as of October 31, 2019. That means that 482 additional people who had an AFS Check rejected in July purchased ammunition between August 31, 2019, and October 31, 2019.

36. A similar trend occurred for the August numbers. In my September 27 Supplemental Declaration, I reported that of the 16,037 unique purchasers rejected

in August, 4,923 (30.69%) had purchased ammunition as of August 31, 2019. Suppl. Decl. ¶ 39, Table 2.3, ECF No. 42. By October 31, 2019, that number had increased to 6,563 (40.92%), meaning an additional 1,640 people who had an AFS Check rejected in August purchased ammunition between August 31, 2019, and October 31, 2019.

37. Of the 14,008 individuals who had an AFS Check rejected in September, 5,371 (38.34%) had purchased ammunition by October 31, 2019.

38. And of the 10,896 individuals who had an AFS Check rejected in October, 3,580 (32.86%) had purchased ammunition by October 31, 2019.

III. PERSONS PREVENTED FROM PURCHASING AMMUNITION AND SUBSEQUENTLY DEEMED ELIGIBLE.

39. In my September 27 Supplemental Declaration, I provided information in response to the Court's inquiry about purchasers who had been denied approval to purchase ammunition because they were prohibited, but who were later determined to not be prohibited. Suppl. Decl. ¶ 40, ECF No. 42.

40. I reported that four purchasers were denied on the grounds of a prohibiting offense, mental health commitment, or restraining order, but were subsequently determined to have been eligible to purchase ammunition at the time of purchase, and that an additional five purchasers were ineligible to purchase ammunition on the face of their official records, but were later determined to be eligible after Department staff investigated the matter. Suppl. Decl. ¶ 45, ECF No. 42.

41. The Department has now reviewed over 400 of the transactions where the purchaser was denied as prohibited. Based on that review, one additional purchaser, for a total of five purchasers, was denied on the grounds of a prohibiting offense, mental health commitment, or restraining order, but was, based on the face of the official records, subsequently determined to have been eligible to purchase ammunition at the time of purchase. Three new transactions were uncovered where

1 the purchaser was ineligible to purchase ammunition on the face of their official
2 records, but were later determined to be eligible after Department staff investigated
3 the matter. The number of those transactions stands at eight.

4 42. To summarize, with over three-quarters of the denials from July 1, 2019,
5 through October 31, 2019, reviewed, 13 purchasers who were denied as prohibited
6 persons have since been determined to be eligible.

7
8
9 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
10 is true and correct.

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12 Executed on: November 18, 2019

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15 MAYRA G. MORALES
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TABLE 1 – BASIC AMMUNITION ELIGIBILITY CHECKS

Table 1.1: Basic Checks — Approvals, Denials, & Rejections

	July 2019	August 2019	September 2019	October 2019	Total
Basic Checks Received	3,798	5,066	3,213	2,400 ¹	14,477
Basic Checks Processed	3,798	5,066	3,201	2,266	14,331
Approved ²	3,607 (94.97%)	4,852 (95.78%)	3050 (95.28%)	2,189 (96.60%)	13,698 (95.58%)
Denied (Prohibited Persons)	119 (3.13%)	130 (2.57%)	87 (2.72%)	60 (2.65%)	396 (2.76%)
Rejected (no match with DMV records)	22 (0.58%)	17 (0.34%)	24 (0.75%)	10 (0.44%)	73 (0.51%)
Rejected (incomplete history)	50 (1.32%)	67 (1.32%)	40 (1.25%)	7 (0.31%)	164 (1.14%)

¹ As of November 1, 2019, 12 (0.37%) Basic Checks received in September and 65 (2.71%) Basic Checks received in October, had been delayed. In addition, 69 (2.88%) Basic Checks received in October had not yet been processed as of November 1, 2019. For example, requests received on October 31, 2019, likely would not have been processed by the time I collected data for this declaration.

² Transactions that were initially denied, but later approved, are treated as approved for purposes of this table.

Table 1.2: Basic Checks — Processing Times

	July 2019	August 2019	September 2019	October 2019
Average Time ³	3 days, 1 hr., 30 mins.	2 days, 7 hrs., 59 mins.	1 day, 10 hrs., 2 mins.	1 day, 4 hrs., 45 mins.

Table 1.3: Approved Basic Checks — Processing Times

	July 2019	August 2019	September 2019	October 2019
Automatically Processed	811 (22.48%)	1,092 (22.51%)	713 (23.38%)	558 (25.49%)
Average Time	2 hrs., 5 mins.	1 hr., 40 mins.	2 hrs., 36 mins	1 hr., 59 mins.
Manually Processed	2,796 (77.52%)	3,760 (77.49%)	2,337 (76.62%)	1,631 (74.51%)
Average Time ⁴	2 days, 12 hrs. 29 mins.	2 days, 4 hrs., 3 mins.	1 day, 4 hrs., 25 mins.	1 day, 12 hrs., 2 mins.

³ My September 27 Supplemental Declaration used August 31, 2019, as a cut-off for calculating transaction times. *See* Suppl. Decl. ¶ 16, ECF No. 42. Not all July and August 2019 Basic Checks had determinations made by that date. When I had the calculation re-run as of October 31, 2019, all July and August Basic Checks were considered, as they all had determinations made. The longer total processing times for July and August reported in this declaration are a result of a relatively small number of transactions significantly increasing the average. Based on the times reported in my September 27 Supplemental Declaration, the typical Basic Check that required manual processing took 1 day, 17 hours, and 31 minutes, in August, and 1 day, 4 hours, and 50 minutes, in July. *See* Suppl. Decl. at p. 4, Table 1.2, ECF No. 42.

⁴ For the reasons discussed in footnote 3, the average times for July and August have increased compared with the numbers reported in my September 27 Supplemental Declaration. *See* Suppl. Decl. at p. 4, Table 1.3, ECF No. 42.

TABLE 2 – AFS CHECKS (STANDARD AMMUNITION ELIGIBILITY CHECKS)

Table 2.1: AFS Checks — Approvals, Denials, & Rejections					
	July 2019	August 2019	September 2019	October 2019	Total
AFS Checks Processed	57,553	101,058	100,560	86,376	345,547
Approved	46,702	80,811	83,051	72,847	283,411
Denied (Prohibited Persons)	14	28	28	31	101
Rejected (no match with AFS records)	10,837	20,247	17,481	13,498	62,063

Table 2.2: AFS Checks — Reasons for Rejections

	July 2019		August 2019		September 2019		October 2019	
Total Rejected	10,837		20,219		17,481		13,498	
Address Mismatch (name, date of birth, and ID number match)	4,077	37.62%	7,160	35.41%	6,420	36.73%	4,925	36.49%
No Identifiable AFS Entry (purchaser not eligible for AFS Check)	3,303	30.48%	6,563	32.46%	5,609	32.09%	4,288	31.77%
Name Mismatch (date of birth, address, and ID number match)	1,452	13.40%	2,563	12.68%	2,197	12.57%	1,744	12.92%
Name and ID Number Mismatch (date of birth and address match)	423	3.90%	774	3.83%	689	3.94%	510	3.78%
AFS Entry No Longer Valid (Name, Date of Birth, ID Number, and Address Match)	322	3%	576	2.85%	443	2.53%	361	2.67%
Name and Address Mismatch (date of	301	2.78%	671	3.32%	666	3.81%	524	3.88%

Table 2.2: AFS Checks — Reasons for Rejections

	July 2019		August 2019		September 2019		October 2019	
birth and ID number match)								
AFS Entry No Longer Valid (Partially Matched on a combination of Name, Date of Birth, ID, Address)	258	2.38%	522	2.58%	425	2.43%	333	2.47%
ID Number and Address Mismatch (name and date of birth match)	248	2.29%	497	2.46%	392	2.24%	298	2.21%
ID Number Mismatch (name, date of birth, and address match)	209	1.93%	383	1.89%	290	1.66%	226	1.67%
Date of Birth Mismatch (name, address, and ID number match)	148	1.37%	259	1.28%	188	1.08%	154	1.14%
Date of Birth and ID Number Mismatch	41	0.38%	124	0.61%	66	0.38%	65	0.48%

Table 2.2: AFS Checks — Reasons for Rejections

	July 2019		August 2019		September 2019		October 2019	
(name and address match)								
Date of Birth and Address Mismatch (name and ID number match)	34	0.31%	72	0.36%	49	0.28%	45	0.33%
Name and Date of Birth Mismatch (address and ID number match)	16	0.15%	28	0.14%	19	0.11%	18	0.13%
Name, Date of Birth, and Address Mismatch (ID number match)	5	0.05%	27	0.13%	28	0.16%	7	0.05%

Table 2.3: Purchasers Who were Rejected on an AFS Check and Subsequently Purchased Ammunition on or before August 31, 2019

	July 2019	August 2019	September 2019	October 2019
Individuals Rejected in AFS Checks	9,027	16,037	14,008	10,896
Number Who Purchased Ammunition on or before October 31, 2019, after an AFS Check Rejection	3,950 ⁵	6,563 ⁶	5,371	3,580

⁵ As of August 31, 2019, this number was 3,468. *See* Supp. Decl. at p. 11, Table 2.3, ECF No. 42. The difference between that number and the number in this table means that 482 additional people who received an AFS Check rejection in the month of July were able to purchase ammunition using some form of eligibility check between August 31 and October 31, 2019.

⁶ As of August 31, 2019, this number was 4,923. *See* Supp. Decl. at p. 11, Table 2.3, ECF No. 42. The difference between that number and the number in this table means that 1,640 additional people who received an AFS Check rejection in the month of August were able to purchase ammunition using some form of eligibility check between August 31 and October 31, 2019.

CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra** No. 3:18-cv-00802-BEN-JLB

I hereby certify that on November 18, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SECOND SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES IN SUPPORT OF DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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 November 18, 2019, at Sacramento, California.

Nelson Richards

Declarant

/s/ Nelson Richards

Signature

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C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Matthew D. Cubeiro – SBN 291519
MICHEL & ASSOCIATES, P.C.
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

JOINT STATUS REPORT

BACKGROUND

On October 1, 2019, the parties participated in a telephonic status conference, during which the Court suspended the existing discovery cut-off dates and instructed counsel for the parties to meet and confer to develop agreed upon dates for new discovery deadlines to propose to the Court. Tr. of Proceedings at 45:22-46:1-2, 46:7-13, Oct. 1, 2019. The Court indicated it would hold another status conference sometime in late November and also suggested that it might hold an evidentiary hearing before ruling on Plaintiffs' Motion for Preliminary Injunction. Tr. of Proceedings at 43:15-17, 46:7-10, Oct. 1, 2019. The Court also invited Plaintiffs to file a supplemental brief, which they did on October 29, 2019. (ECF No. 46).

JOINT STATUS REPORT & REQUESTS

Counsel for the parties have met and conferred and, based thereon, jointly and respectfully request the following from the Court:

- 1) That no evidentiary hearing take place prior to the Court ruling on Plaintiffs' Motion for Preliminary Injunction, due not only to the significant costs and time required to hold one, and the potential redundancy of the merits stage, but also because the parties agree that the material facts are generally undisputed and that counsel should be able to address most, if not all, of the Court's questions about the issues currently before the Court sufficient to decide the pending motion;
- 2) That the Court grant Defendant an opportunity to respond to Plaintiffs' supplemental brief, either via a written brief not to exceed 10 pages to be filed within 14 days of the Court's response to this Joint Status Report, or at a hearing with counsel for all parties present to take place on the first convenient date for the Court (but excluding November 22, 25 and December 2, 4, 5, 2019);
- 3) That the Court allow the parties to wait until after the Court rules on Plaintiffs' Motion for Preliminary Injunction to meet and confer and finalize their stipulation concerning all new discovery deadlines at that time, because the parties believe that awaiting a ruling from the Court on the pending motion would likely add clarity to the issues that would facilitate the parties agreeing upon a case schedule going forward.

Dated: November 7, 2019

Respectfully submitted,
MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Email: sbrady@michellawyers.com
Attorneys for Plaintiffs

Dated: November 7, 2019

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

s/ Nelson R. Richards
NELSON R. RICHARDS
Email: nelson.richards@doj.ca.gov
Attorneys for Defendant

Attestation of Concurrence in Filing

I, Sean A. Brady, am the ECF user whose ID and password are being used to file the foregoing Joint Status Report. I hereby attest that all signatories listed above, and on whose behalf this filing is submitted, concur in the filings content and have authorized the filing.

Dated: November 7, 2019

s/ Sean A. Brady
Sean A. Brady

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

JOINT STATUS REPORT

on the following parties by electronically filing the foregoing on November 7, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 7, 2019, at Long Beach, CA.

s/ Laura Palmerin
Laura Palmerin

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Matthew D. Cubeiro – SBN 291519
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**DECLARATION OF NANDU
IONESCU IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL
BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Judge: Hon. Roger T. Benitez
Courtroom: 5A

DECLARATION OF NANDU IONESCU

1. I, Nandu Ionescu, make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I am a resident of Los Angeles County, California. I am a citizen of the United States who is not prohibited from owning or possessing firearms or ammunition under state or federal law. I am also a member of the California Rifle & Pistol Association, Incorporated, who is a plaintiff in this action.

3. On October 9, 2019, I attempted to purchase ammunition from Turner's Outdoorsman in Norwalk, California using the "Standard Ammunition Eligibility Check" ("AFS Match)" option. My attempted purchase was rejected.

4. Following the rejection of my attempted purchase, I entered my transaction information into the California Department of Justice's ("DOJ") CFARS website that same day to learn the reason for my rejection. DOJ's CFARS website stated the following:

Rejected:

Pursuant to Penal Code section 30370, subdivision (b), your name, date of birth, current address, and government issued or military identification must match an entry in the Department of Justice, Bureau of Firearms' Automated Firearms System (AFS) (state-wide firearm ownership repository). You have been rejected for one of the following reasons: 1) you do not have an AFS record or 2) the information you provided to the ammunition vendor does not match the AFS record that is on file. Information on what establishes an AFS record or how to update an existing AFS record can be found at CFARS Home.

5. After reviewing this information, I attempted to update my existing AFS records with DOJ by submitting an Automated Firearms System (AFS) Personal Information Update application through DOJ's CFARS website that same day.

6. On October 11, 2019, I attempted to purchase ammunition from Turner's Outdoorsman in Norwalk, California using the "Standard Ammunition Eligibility Check (AFS Match)" option. My attempted purchase was rejected.

7. Following the rejection of my second attempted purchase, I entered my transaction information into DOJ's CFARS website to learn the reason for my rejection. DOJ's CFARS website stated the identical reason for my rejection as the previous time.

8. On October 15, 2019, I again attempted to purchase ammunition from Turner's Outdoorsman in Norwalk, California using the "Standard Ammunition Eligibility Check (AFS Match)" option. My attempted purchase was again rejected.


9. Following the rejection of my third attempted purchase, I entered my transaction information into DOJ's CFARS website to learn the reason for my rejection. DOJ's CFARS website stated the identical reason for my rejection as the previous two times.

10. On October 17, 2019, nine days after I submitted it, I received electronic notification from DOJ that my Automated Firearms System (AFS) Personal Information Update application had been approved. Attached to this notification was a letter from DOJ stating:

The California Department of Justice has received and processed your electronic submission of the Automated Firearms System Personal Information Update Application. Your personal information has been updated with the personal information provided on your submission.

11. On October 18, 2019, I attempted to purchase ammunition from Bass Pro Shops in Rancho Cucamonga, California using the "Standard Ammunition Eligibility Check (AFS Match)" option. My attempted purchase was approved.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on October 23, 2019.



Nandu Ionescu
Declarant

3
DECLARATION OF NANDU IONESCU

18cv802

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**DECLARATION OF NANDU IONESCU IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on October 29, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2019, at Long Beach, CA.

s/ Laura Palmerin
Laura Palmerin

C.D. Michel – SBN 144258
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**DECLARATION OF WILLIAM D.
SHEPARD IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL
BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Judge: Hon. Roger T. Benitez
Courtroom: 5A

DECLARATION OF WILLIAM D. SHEPARD

1. I, William D. Shepard, make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I am a resident of Contra Costa County, California. I am a citizen of the United States who is not prohibited from owning or possessing firearms or ammunition under state or federal law. I am also a member of the California Rifle & Pistol Association, Incorporated.

3. On September 11, 2019, I submitted a Firearm Ownership Report for a shotgun to the California Department of Justice (“DOJ”) using the CFARS website for the purpose of creating a record in the Automated Firearms System (“AFS”) so that I would qualify for an AFS background check to purchase ammunition.

4. On September 13, 2019, I received an email from DOJ in response to my submission stating that DOJ had received my Firearm Ownership Report form, but it could not be processed because, as stated in this email:

Please provide the model of the firearm. Provide the requested information within 30 days. Failure to do so will result in your transaction being rejected and your firearm(s) not being recorded in your name. Please note: Your fee will not be refunded if your application is rejected.

5. That same day, I responded to DOJ’s email by stating that I had indeed provided the model of the firearm on my Firearm Ownership Report form. In fact, the “model” field of the Firearm Ownership Report form was comprised of a drop-down list provided by DOJ’s CFARS website. One of the options in this drop-down list included “SHOTGUN,” which is what I had selected. I also stated in my response to DOJ that I did not understand their question and asked for more information. DOJ later responded by stating:

Please log into your CFARS account and provide the model name (or model number) of your . . . shotgun on your existing INCOMPLETE transaction. If your firearm does not have a model name or number stamped on the lower

receiver or barrel, please leave a comment in the transaction that indicates that. Thank you.

6. In addition to the above, I received a second email from DOJ on September 13, 2019. This email also stated that my submission could not be processed for the following reasons:

Please verify and provide the model of the firearm. Effective 07/01/2019, a copy of your CA driver license or ID is required. In addition, if “FEDERAL LIMITS APPLY” appears on your CA DL/ID, you need to submit additional documentation (Cal. Code Reg., tit. 11, sec. 4045.1 subd. (b-c)). For more info, refer to the Bureau’s website at <https://oag.ca.gov/firearms>. Please provide the requested information within 30 days. Failure to do so will result in your transaction being rejected.

7. In response to this email, I again stated that I had provided the make and model of my shotgun. I also asked how to provide a copy of my driver’s license (which does not state “FEDERAL LIMITS APPLY”) to DOJ. I did not receive a response to this request for additional information.

8. Receiving no response, I submitted a second Firearm Ownership Report for a different shotgun to the California Department of Justice (“DOJ”) using the CFARS website for the purpose of creating a record in the Automated Firearms System (“AFS”) so that I would qualify for an AFS background check to purchase ammunition.

9. On September 17, 2019, I received an email from DOJ stating that one of my Firearm Ownership Report submissions had been received and that DOJ would begin processing my submission. The email also stated that I would be notified of the results via U.S. Mail, and instructed me to use the “Report an Issue” feature on the CFARS website if I had any questions.

10. On September 19, 2019, I received another email from DOJ stating that my other Firearm Ownership Report submission had been received and that DOJ would begin processing my submission. This email was identical to the previous email on September 17, 2019, in all respects.

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11. On September 22, 2019, I tried to buy ammunition and got rejected. I sent an email to DOJ requesting a status update regarding my Firearm Ownership Report submissions. DOJ responded the following day and stated:

The Department of Justice makes every effort to process applications within a timely manner. If applications are not submitted with all the required information, they will be returned to request the missing information which will cause delays in the process. The associated background check may also be delayed by circumstances beyond the control of the department. Due to the high volume of calls, status checks for applications that are not older than 90 days cannot be provided. If you submitted your application, and it is over the 90 day period, please reply with your name, address, date of birth, driver's license number, type of application(s), and the date of the application(s) so that we can review the information and provide you with an update.

A true and correct copy of this email, with redactions of my personal information, is attached to this declaration.

12. The following week, I received a letter in the mail, dated September 25, 2019, stating that one of my Firearm Ownership Report submissions had been received and processed. Following the receipt of this letter, I attempted to purchase ammunition on September 27, 2019, using the Standard Ammunition Eligibility Check (AFS Match) process and was approved.

13. On October 1, 2019, I logged into DOJ's CFARS website to review my transaction history. According to DOJ's CFARS website, my Firearm Ownership Report submissions are still listed as "In Progress." Despite that indicated status, I have been able to successfully pass an AFS Check and purchase ammunition.

14. On October 24, 2019, I checked my transaction history and it still has my registration application as "In Progress."

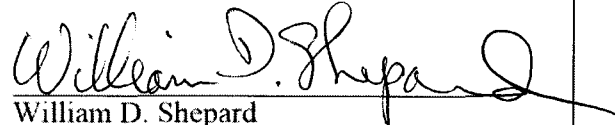
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1 I declare under penalty of perjury that the foregoing is true and correct. Executed
2 within the United States on October 24, 2019.

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5 William D. Shepard
6 Declarant
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DECLARATION OF WILLIAM D. SHEPARD

18cv802

ATTACHMENT

From: Firearms Bureau <Firearms.Bureau@doj.ca.gov>
Sent: Monday, September 23, 2019 11:08 AM
To: Shepard, William D
Subject: RE:

Thank you for your recent inquiry regarding your submitted application(s) for processing. The Department of Justice makes every effort to process applications within a timely manner. If applications are not submitted with all the required information, they will be returned to request the missing information which will cause delays in the process. The associated background check may also be delayed by circumstances beyond the control of the department. Due to the high volume of calls, status checks for applications that are not older than 90 days cannot be provided. If you submitted your application, and it is over the 90 day period, please reply with your name, address, date of birth, driver's license number, type of application(s), and the date of the application(s) so that we can review the information and provide you with an update.

-----Original Message-----

From: Shepard, William D [REDACTED]
Sent: Sunday, September 22, 2019 12:35 PM
To: Firearms Bureau <Firearms.Bureau@doj.ca.gov>
Subject:

To whom it may concern -

How can I find out if my application to register my shotgun has been approved? The CRIS number is [REDACTED]. Is the system impacted now from so many attempts to register a firearm? I teach hunter education classes. What should I tell my students about how the system works? Please respond to my email.

Sincerely yours,

Bill

Bill Shepard
[REDACTED]
[REDACTED]
[REDACTED]

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**DECLARATION OF WILLIAM D. SHEPARD IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on October 29, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

*Attorneys for Defendant Attorney General
Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2019, at Long Beach, CA.

s/ Laura Palmerin
Laura Palmerin

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Matthew D. Cubeiro – SBN 291519
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**DECLARATION OF EDWARD
ALLEN JOHNSON IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL
BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Judge: Hon. Roger T. Benitez
Courtroom: 5A

DECLARATION OF EDWARD ALLEN JOHNSON

1. I, Edward Allen Johnson, make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

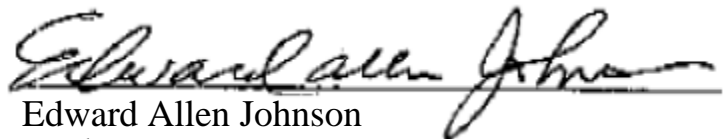
2. I am a resident of San Diego County, California, and plaintiff in this action. I am a law-abiding citizen of the United States who is not prohibited from owning or possessing firearms or ammunition under state or federal law.

3. On June 27, 2019, I submitted an "Automated Firearms System (AFS) Request for Firearm Records" form to the California Department of Justice ("DOJ") for purposes of obtaining my AFS records on file with DOJ.

4. On October 15, 2019, approximately 110 days after submission, DOJ responded to my request by providing my records via U.S. mail.

5. Between June 27, 2019 and October 15, 2019, I contacted DOJ via phone/email at least three times to request the status of my AFS records request. Each time I never received a response.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on October 24, 2019.

A handwritten signature in black ink, reading "Edward Allen Johnson", written over a horizontal line.

Edward Allen Johnson
Declarant

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

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IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2019, at Long Beach, CA.

s/ Laura Palmerin
Laura Palmerin

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Matthew D. Cubeiro – SBN 291519
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Boulevard, Suite 200
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Telephone: (562) 216-4444
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, et al.,
Plaintiffs,

v.

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

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF SUPPLEMENTAL
BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Judge: Hon. Roger T. Benitez
Courtroom: 5A

REQUEST FOR JUDICIAL NOTICE

Under Federal Rule of Evidence 201, Plaintiffs Kim Rhode, Gary Brennan, Cory Henry, Edward Johnson, Scott Lindemuth, Richard Ricks, Denise Welvang, Able's Sporting, Inc., a Texas corporation, AMDEP Holdings, LLC, a Florida limited liability company d/b/a Ammunition Depot, R&S Firearms, Inc., an Arizona corporation d/b/a Sam's Shooters' Emporium, and California Rifle & Pistol Association, Incorporated, a California corporation ("Plaintiffs"), through their counsel, respectfully request that the Court take judicial notice of the following documents in support of Plaintiffs' supplemental brief in support of motion for a preliminary injunction:

1. *Hunters Encouraged to Purchase Ammunition Now as California's 2019-20 Waterfowl Season Is Fast Approaching*, California Department of Fish and Wildlife, <https://cdfgnews.wordpress.com/2019/10/08/hunters-encouraged-to-purchase-ammunition-now-as-californias-2019-20-waterfowl-season-is-fast-approaching/> (Oct. 8, 2019). A true and correct copy of this document is attached as Exhibit 1.

Judicial notice is proper because the documents for which this request is made are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "A trial court may presume that public records are authentic and trustworthy." *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (taking judicial notice of agency report). A court shall take judicial notice of such a fact if requested by a party and supplied with the necessary information. Fed. R. Evid. 201(d).

"Legislative history is properly a subject of judicial notice." *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); *Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005) (discussing legislative history of California statute). Further, "a federal court must take judicial notice of state statutes 'without plea or proof.'" *Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 323 (1st Cir. 2004) (citing *Lamar v. Micou*, 114 U.S. 218, 223 (1885)).

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Here, the accuracy of all the public records subject to Plaintiffs' Request for Judicial Notice, consisting of enacted legislation and legislative history, cannot reasonably be questioned. Judicial notice of these records is therefore appropriate.

Dated: October 29, 2019

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady

Sean A. Brady

Email: sbrady@michellawyers.com

Attorneys for Plaintiffs

EXHIBIT 1



California Department of
Fish and Wildlife

CDFW News

≡ MENU



Hunters Encouraged to Purchase Ammunition Now as California's 2019-20 Waterfowl Season Is Fast Approaching

October 8, 2019

California's 2019-20 waterfowl hunting season opens Oct. 19 throughout much of the state and waterfowl hunters are encouraged to stock up on their favorite duck and goose loads sooner rather than later so as not to miss out on any hunting opportunities.

"Waterfowl hunters tend to be very generous people, and one of the best things about the season are those special invitations to be a guest at a private duck club or a last-minute offer to join in on a waterfowl reservation at a public hunting area," said Melanie Weaver, who oversees the California Department of Fish and Wildlife's (CDFW) waterfowl program. "We don't want any of our waterfowl hunters to miss out on these experiences because they had difficulty finding or buying ammunition the night before their hunt."

New, more stringent ammunition purchasing regulations took effect in California July 1, 2019, requiring background checks, often multiple forms of personal identification, and a current and accurate record within the California Department of Justice's Automated Firearms System. Hunters who haven't purchased a shotgun or rifle in California since 2014 or had one transferred or recorded through a licensed firearm dealer in California may have difficulty purchasing ammunition. More information is available at the [California Department of Justice website](#).

Specific [opening and closing waterfowl season dates](#) vary by [zone](#). Detailed information about daily bag and possession limits can be found on the [Fish and Game Commission website](#).

Quality public hunting is available on more than two dozen national wildlife refuges and state [wildlife areas and ecological reserves](#) managed by CDFW. Nontoxic shot certified by the U.S. Fish and Wildlife Service has been required nationwide for waterfowl hunting since 1991. For more information, please see the CDFW [nonlead ammunition webpage](#).

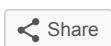
It is common for waterfowl hunting areas to close periodically throughout the season due to safety concerns caused by flooding. Areas that most commonly experience flood closures include Yolo Bypass Wildlife Area, Sutter National Wildlife Area, Delevan National Wildlife Refuge, and Little Dry Creek and Howard Slough Units of Upper Butte Basin Wildlife Area. Hunters should keep informed regarding potential closures [on the public area status website](#), which will be updated throughout the season. Reservations for state-operated wildlife areas that are closed due to flooding will not be accepted at other hunting areas, and refunds will not be issued for applications submitted to areas that are closed or where reservations are not available.

A [valid California hunting license](#), appropriate validations and a signed federal duck stamp or the electronic duck stamp must be obtained before entering the field. In addition, a wildlife area hunting pass is required to hunt on many state-operated wildlife areas. Licenses, validations and passes are not sold at wildlife areas, so hunters must purchase these items in advance.

California hunters are required to complete a [hunter education training course](#) before purchasing a hunting license for the first time in California. Approximately 30,000 students complete this requirement annually.

CDFW Photo: Black brant hunting in Humboldt Bay.

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CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

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I have caused service of the following documents, described as:

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on October 29, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

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**UNITED STATES DISTRICT COURT
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capacity as Attorney General of the State
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Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**SUPPLEMENTAL BRIEF IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Judge: Hon. Roger T. Benitez
Courtroom: 5A

BACKGROUND

At the hearing on Plaintiffs' Motion for Preliminary Injunction, the Court deferred its ruling on the motion and ordered the State to disclose to Plaintiffs information about individuals who had been either "rejected" or "denied" ammunition purchases during July and August 2019.¹ Tr. of Proceedings at 133:6-135:21, Aug. 19, 2019. Essentially, the State was to provide documentation of the (1) reasons for and rates of *rejections*, (2) rate of those *rejected* who have since been able to purchase ammunition, and (3) reasons for *denials*, including wrongful ones for people who DOJ had incorrectly determined to be legally ineligible. *Id.* at 133:11-25.

In compliance with the Court's order, the State filed the Supplemental Declaration of Mayra G. Morales in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction. Morales Decl. Supp. Opp'n Pls.' Mot. Prelim. Inj. ("Suppl. Morales Decl."), Aug. 27, 2019, ECF No. 42. At the same time, the State provided Plaintiffs with Excel spreadsheets containing the figures on which the State claims it based the information presented in the supplemental declaration.

On October 1, 2019, the parties participated in a telephonic status conference, during which the Court ordered the State to disclose to Plaintiffs the same information from July and August it had provided in the supplemental declaration, but for September and October. The Court also invited Plaintiffs to file this supplemental brief, explaining their view of the information the State disclosed in its supplemental declaration and its impact on their motion. The Court then ordered the parties to participate in another telephonic status conference on November 15, 2019, and suggested that it might hold an evidentiary hearing before ruling on Plaintiffs' motion.

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¹ Plaintiffs understand the difference between "rejected" and "denied" is that the former describes those who lack required information in DOJ's system to complete a background check, while the latter describes those legally prohibited from possessing ammunition.

SUMMATION OF ARGUMENT

The State’s supplemental declaration provides all the evidence this Court needs to preliminarily enjoin the challenged provisions. It confirms that around 20% of people seeking to purchase ammunition are prevented from doing so for an indefinite amount of time, not for being legally ineligible to possess ammunition, but because their records are not to the State’s liking. And, when rejected, the State offers no specific explanation of the reason for the rejection or the process to remedy it. While some of those who were rejected resolve issues with their records in hours to days, the State cannot dispute that some may need weeks or months to do so, assuming they are able to at all. To that point, a clear majority of those rejected in July and August (60-70%) did not successfully purchase ammunition by the end of August. Others are denied because DOJ wrongly considers them prohibited. These problems are so prevalent that California alerted hunters that they “may have difficulty purchasing ammunition” and advised them to do so with time to spare for such a contingency. Req. Jud. Ntc. Supp. Suppl. Br. Pls.’ Mot. Prelim. Inj. ¶ 1.

Not only do these undisputed facts raise serious doubts about whether the System furthers the State’s interests at all, they confirm that it burdens far too much protected activity to be a reasonable “fit” under heightened scrutiny. What’s more, these problems with the System are in addition to the identification and delay issues raised in Plaintiffs’ motion briefing. Pls.’ Mem. Supp. Mot. Prelim. Inj. (“Mot.”) at 7, 10-11, 14, 17-19; Reply to Def.’s Opp’n to Pls.’ Mot. Prelim. Inj. (“Reply”) at 5-7. And purchasers seeking to acquire ammunition from an out-of-state seller not only face these burdens, but also the discretion of in-state vendors over whether they can even acquire the ammunition and at what cost, in violation of the dormant Commerce Clause. Mot. 20-23; Reply 7-8.

The parties largely do not dispute facts but rather the legal implications of the facts. Thus, neither the November 15 status conference nor an evidentiary hearing is necessary. Respectfully, the Court can and should decide Plaintiffs’ motion on this record. Because facts in that record, as even the State relates them, show Plaintiffs are likely to succeed on the merits and that the System inflicts irreparable harm, the Court should grant the motion.

ANALYSIS

I. AMMUNITION PURCHASE REJECTION RATE

Reports of problematic ammunition purchase rejection rates following the launch of the ammunition background check system (the “System”) were among the main reasons Plaintiffs sought a preliminary injunction. Mot. at 9, 15. Lacking access to any hard numbers on the prevalence of rejections, Plaintiffs had to rely on accounts from vendors to describe the problem. *Id.* In opposing Plaintiffs’ motion, however, the State provided those numbers and removed any doubt that the rejection rate for July was high by any measure, being around 20%. Decl. Mayra G. Morales Supp. Def.’s Opp’n Pls.’s Mot. Prelim. Inj. (“Morales Decl.”) ¶¶ 49-52. Plaintiffs still believe, as they did when filing the motion, that such an excessive rejection rate is constitutionally fatal. Mot. 15, 18; Reply 5.

In deferring its ruling on Plaintiffs’ motion, this Court—perhaps wanting more time to pass to see whether that rate would decrease or was inherent in the background check system—ordered the State to provide Plaintiffs with details about people who had been rejected or denied. The State complied and, according to its most recent figures, the rejection rate in August remains virtually unchanged from July. Suppl. Morales Decl. ¶¶ 17, 26 (tbls. 1.3, 2.1). This outcome suggests that the high rejection rate is inherent in the System. Issuance of an injunction is thus warranted.

A. AFS Checks

AFS Checks had a rejection rate around 20% in July. That rate held steady in August, up about 1.2% from July. *Id.* ¶ 26 (tbl. 2.1). The State suggests that rate is artificially inflated because 30% of those rejected “appear” to have used an AFS Check without having the necessary AFS record to do so. *Id.* ¶¶ 2, 9. Plaintiffs cannot confirm that figure. But, even if accurate, it highlights a flaw in the System. If people do not already possess their AFS record, the State does not inform them whether they have a sufficient AFS record—or one at all—at the time of purchase. So, people must essentially guess whether they qualify for an AFS Check.

The State has determined that the remaining 70% of people rejected under an AFS

Check have AFS records, but there are trivial issues with those records. These issues could be an old address, a different name (perhaps a legal name change or the simple presence or absence of an affix or middle name or initial), or date of birth or ID number mismatches. *Id.* ¶¶ 9-10.² By noting the reasons these people were rejected, the State tacitly admits that it knows who they are, that they have an AFS record, and that they are not prohibited persons. But the State *still* rejects them indefinitely simply because of these clerical discrepancies. People should not be denied the exercise of their rights, even if temporarily, based on such trivialities.

B. Basic Checks

Basic Checks appear to continue to have a far less significant rejection rate than AFS Checks. But about one percent of purchasers who underwent a Basic Check in July and August were rejected for what appear to be the same trivial clerical discrepancies that plague the AFS Checks and which do not justify the denial of fundamental rights. *Id.* ¶ 4.

C. Certificate of Eligibility (“COE”) Verification Checks

While previously providing figures for COE Verification Check rejections, Morales Decl. ¶ 11, the State provides no mention of those figures for August in its supplemental declaration. The original declaration showed that around one out of every eight people (about 12%) who used the COE Verification Check option were rejected. *Id.* ¶ 51. COE holders should have zero rejections or, at least rare ones. As Plaintiffs have explained, to obtain a COE, a person must have taken extra steps with the State, including submitting to an extensive background check and fingerprinting, to establish that they are eligible to purchase *firearms*, Req. Jud. Notice, Ex. 32. A COE is automatically revoked if its holder later becomes prohibited from firearm ownership. *See* Req. Jud. Ntc. Supp. Def.’s Mot.

² The State also identifies “[a] small number of purchasers [who] had AFS entries, but those entries were no longer valid because the purchaser had transferred the firearm associated with the entry to someone else.” Suppl. Morales Decl. ¶ 31. But the State fails to explain why such an AFS entry would not be suitable for an AFS Check. The point of looking to AFS is to confirm the person has previously undergone a full background check. Whether the person is the current owner of the firearm in the AFS record is irrelevant for purposes of the AFS Check, as far as Plaintiffs can tell.

Dismiss First Am. Compl. ¶ 4. The State provides no justification for such a high rejection rate among COE holders, who have been pre-vetted and who are associated with a unique identifying number.³ If that rejection rate remains constant, this is perhaps the strongest evidence that the System is inherently flawed.

II. REMEDIATION OF REASON FOR REJECTION

The State identifies four courses of action a person who is rejected under an AFS Check can take to overcome the rejection. Each supports Plaintiffs' view that the System is constitutionally offensive and should be immediately enjoined.

First, the State says that "in many scenarios the person may use the California Firearms Application Reporting System (CFARS) to update their personal information." Suppl. Morales Decl. ¶ 6. The State explains that those whose current address does not match their AFS records can log into CFARS and apply to update their AFS records with their current address, which "if a match is found in [AFS] . . . may take less than 10 minutes" for DOJ to update, "but depending on the number of pending applications, may take longer." Morales Decl. ¶ 21. Those needing to update an AFS record for changes to a name, identification number, or date of birth can also do so through CFARS; the process "may take a few hours, but depending on [DOJ] workload, can take several days (excluding weekends)" *Id.* ¶ 22. The reasons for the rejections and delays as the State describes them are unacceptable. But the System is even worse than the State's depiction.

To begin with, the State does not explain what people who do not fall within the "many scenarios" where CFARS can be used to update their AFS record are supposed to do. Even in the instances in which CFARS may be used to fix records, people must know they can do so. But no mechanism is in place to make sure that prospective purchasers know about CFARS, let alone how to use the complicated system. *See Id.* ¶ 20. They must

³ The State suggests that the figures for people who did not pass the COE Verification Check could include denials. Morales Decl. ¶ 11. Setting aside the problems with the State's denial figures generally discussed below in Part III, Plaintiffs doubt that a COE holder could be a prohibited person because of the nature of the COE system.

either rely on the vendor to explain it to them—which the vendor has no obligation to do or may not even know—or take it upon themselves to figure it out by research.

The State also grossly understates the time it can take to correct an AFS record. While it may take DOJ just 10 minutes to update an address in an AFS record, the State does not explain how long it takes for it to actually get around to updating it. *Id.* ¶ 21. It can take well over a week. Decl. Nandu Ionescu Supp. Pls.’ Mot. Prelim. Inj. (“Ionescu Decl.”) ¶ 10. The same is true for other AFS records. DOJ *can* update them in “a few hours” or “several days” but admits that it does not know how long it could take. Tr. of Proceedings at 18:25-19:1-5, 20:8-23, Oct. 1, 2019. Even if that were the case, a several-day-wait is unnecessarily excessive; particularly when the law says a background check “approval shall occur at the time of purchase or transfer.” Cal. Penal Code § 30370. So when the State claims that “people may use CFARS to correct their AFS information in a relatively short amount of time,” that is not necessarily the case. Suppl. Morales Decl. ¶ 8.

What’s more, and perhaps most problematic, the State does not even provide a specific explanation of the reason for a rejection. Rejected purchasers are told only that their transaction has been rejected or denied and provided with a number “that can be used to obtain the reason for the rejection through [DOJ’s] CFARS website.” Tr. of Proceedings at 18:11-24, Oct. 1, 2019; Cal. Code Regs. tit. 11, § 4302(e). Assuming they even learn from the vendor or through personal research about CFARS, that system does not explain the specific reason for a rejection either. It merely provides a boilerplate explanation that either the person has no AFS record or there is *some* discrepancy between the person’s existing AFS record and current personal information. Ionescu Decl. ¶¶ 4, 7, 9. And calling DOJ for assistance is generally futile; its staff will not explain to people why they have been rejected. At best, the staff will give examples of what could be wrong with the person’s record and direct how to address hypothetical issues. Decl. William D. Shepard Supp. Pls.’ Mot. Prelim. Inj. (“Shepard Decl.”) ¶ 4-7. So people need to either figure out why they were rejected on their own or double down on the gamble by trying another type of background check, each of which comes with its own problems, including

a risk of rejection, as explained further below. *See infra* p. 8.

To update an AFS record through CFARS, people must know the contents of at least one of their existing AFS records. Morales Decl. ¶ 20; Cal. Code Regs. tit. 11, § 4353(c). If unsure of existing AFS records, the State says that people can request a copy of their records from DOJ. Morales Decl. ¶ 23. Once they have those records, they can presumably see what the discrepancy is and fix the problem through CFARS. *See* Req. Jud. Ntc. Supp. Pls.’ Mot. Prelim. Inj. Ex. 28. But again there is no guidance from the State on what specifically needs updating. What’s more, there is no mechanism in place to notify people that they can order their AFS record—they must once again rely on the vendor or their own research for that information. Nor does the State explain how long it takes DOJ to process AFS record requests. To Plaintiffs’ knowledge, DOJ has no established timeframe for doing so. In fact, Plaintiff Johnson waited over 110 days for DOJ to respond to his request for his AFS records. Decl. Edward Johnson Supp. Pl.’s Mot. Prelim. Inj. (“Johnson Decl.”) ¶ 4. Plaintiffs are aware, however, of what they believe is a DOJ-BOF policy that “status checks for applications [for AFS records] that are not older than 90 days cannot be provided.” Shepard Decl. ¶ 10. In sum, fixing AFS records can take a significant amount of time, potentially months, during which people waiting for the fix cannot exercise their constitutional right to purchase ammunition.

Second, for those who own a firearm that has no AFS record, the State explains that they may submit to DOJ a Firearms Owner Report along with a \$19 fee to create an AFS record. Suppl. Morales Decl. ¶ 6. The State says that “[o]nce the report is processed and approved” the person will have an AFS entry that can be used to buy ammunition through an AFS Check. *Id.* Setting aside that this adds another fee for a background check, the State yet again fails to explain how long this process and approval will even take. There is no statutory or regulatory deadline. It is thus an indefinite—and thus unacceptable—delay.

The **third** option the State offers prospective ammunition purchasers is to buy a new firearm, which would create an AFS record that can be used for an AFS Check. *Id.* This is not only a costly option, but the ammunition cannot be delivered for at least 10

days, along with the firearm. Cal. Code Regs. tit. 11, § 4304; *see also* Cal. Penal Code § 27540. This is both an undue burden for existing firearm owners, and an unacceptable barrier to entry for those who merely seek to obtain ammunition to learn about firearms by attending a training course or learning to shoot with more experienced people.

Finally, the fourth option is to undergo either the full-scale Basic Check—which requires payment of \$19 and an average wait of almost two days, Suppl. Morales Decl. ¶¶ 3-5⁴—or obtain a COE, which can take months to obtain and comes with a price tag of around \$100. *See* Mot. 6-7. These options are also both unacceptable burdens on current gun owners and barriers to entry for people considering entering the world of firearm ownership or familiarity. What’s more, as with rejections under the AFS Check option, the State again fails to explain specifically why people *rejected* under the Basic Check or the COE Verification Check systems—who are by definition not legally prohibited from acquiring ammunition—were rejected. Nor does the State explain how they are supposed to remedy the reason for their rejection. While this is a less prevalent problem than AFS Check rejections, the State does not purport to have a recourse for these people, which account for *at least* 236 cases in July and August alone. Suppl. Morales Decl. ¶ 15 (tbl. 1.1); Morales Decl. ¶ 51 (not accounting for COE Verification Check rejections for August because the State did not provide them). A system that denies people exercise of their rights and leaves them unaided in remedying the cause of their denial simply cannot be constitutionally sound.

The State claims that 30-40% of people rejected by AFS Checks in July or August were able to purchase ammunition at some point before August 31, 2019. Suppl. Morales Decl. ¶ 7. Plaintiffs have no way to verify that claim. But, even if true, it means the State admits that a significant majority (60-70%) of non-prohibited persons who were rejected

⁴ What’s more, undergoing a Basic Check does not create an AFS record. *See* Cal. Penal Code § 11106. Those without an AFS record must pay \$19 and wait hours to days *every time* they purchase ammunition. The State explains this is because AFS is based on a firearm purchase and a Basic Check is not. Tr. of Proceedings at 31:22-32:1-14, Oct. 1, 2019. But the State does not explain why such limitation is necessary.

ammunition purchases over the course of two months under the AFS Check system had not remedied their situation. What's more, the State offers no evidence about whether any of the at least 236 non-prohibited persons rejected under the Basic Check or COE Verification Check systems subsequently fixed the cause of their rejection and acquired ammunition. It must be assumed those people remain in limbo. Such a rate of attrition would never be tolerated in the context of any other constitutional right.

III. DENIALS INCLUDE MANY *NON-PROHIBITED* PERSONS

According to the State, in July and August 289 people were “denied” ammunition purchases. Suppl. Morales Decl. ¶¶ 41-42. The State says it reviewed “approximately 45” of those 289 individuals to confirm whether they were proper denials. *Id.* ¶ 45. That review resulted in the State finding that nine of those denied—or 20%—were *not* prohibited persons. In other words, they were wrongly denied. *Id.*⁵ If that is representative of the entire class of people denied, that means about 58 people were wrongly denied.

But the number of wrongly denied people could be significantly higher. The State reveals that it will *deny* (not just reject) a purchase if DOJ cannot determine whether the person is prohibited. *Id.* ¶ 15 n.2 (“[I]f the Department is unable to obtain the information [necessary to determine whether a purchaser is prohibited] it will ultimately deny the transaction because an eligibility determination could not be made.”) Not only does this raise the question of how many of the people DOJ has denied fall into that camp, but it proves that such a system is an inappropriate gatekeeper to the exercise of a fundamental right. It is the government’s burden to prove that an individual should be denied the exercise of a right. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). This system has that burden exactly backwards, denying people the exercise of a right and placing the burden on them to prove to the government they are entitled to exercise it.

⁵ It is unclear whether the State subsequently notified any of those individuals that they are eligible for ammunition purchases. Without confirmation that they have been notified, those people, practically speaking, remain wrongly denied.

IV. NON-RESIDENT RESTRICTIONS

Finally, according to the State, non-residents can only utilize the COE Verification Check to be able to purchase ammunition while in California. Req. Jud. Ntc. Ex. 12 (Attachment A- Public Comments and Department of Justice Responses, DOJ Response to Summarized Comment # 67b). The State has provided no information about how many non-residents have purchased ammunition from a licensed California vendor since July 1, 2019—the date the background check requirement took effect. Cal. Penal Code § 30370(a). As Plaintiffs have argued, this is effectively a ban on non-residents purchasing ammunition while present in California. Mot. 17-18. Without proof that non-residents are successfully purchasing ammunition in-state, this consequence of the State’s background check system alone is enough to warrant its being enjoined as unconstitutional.

CONCLUSION

Factual disputes are not a significant issue in this matter. The parties may quibble on details. But they agree that: (1) the System rejects 20% of ammunition purchasers; (2) the State does not directly inform those rejected of the specific reason for the rejection or how to remedy it; (3) there are no established timeframes for DOJ to update AFS records that would allow a rejected person to purchase ammunition; (4) according to the most recent data, a majority of those rejected do not later successfully acquire ammunition; (5) DOJ *denies* people whose eligibility status it cannot determine; and (6) DOJ has denied purchases to people who were later found to not be prohibited. For these reasons, Plaintiffs respectfully believe that neither the scheduled November 15 status conference nor an evidentiary hearing is necessary to rule on their preliminary injunction motion. The Court should grant that motion on the current record at its earliest convenience.

Dated: October 29, 2019

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady

Sean A. Brady

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on October 29, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
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2550 Mariposa Mall, Room 5090
Fresno, CA 93721
*Attorneys for Defendant Attorney
General Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2019, at Long Beach, CA.

s/ Laura Palmerin
Laura Palmerin

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
3

4 KIM RHODE, et al.,)
5 Plaintiffs,) No. 18-CV-00802-BEN-JLB
6 v.) October 1, 2019
7 XAVIER BECERRA, et al.,) 1:05 p.m.
8 Defendants.) San Diego, California
9

10 TRANSCRIPT OF STATUS CONFERENCE
11 BEFORE THE HONORABLE ROGER T. BENITEZ
12 UNITED STATES DISTRICT JUDGE

12 APPEARANCES (Telephonic):

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25 Reported by Stenotype, Transcribed by Computer

1 SAN DIEGO, CALIFORNIA, OCTOBER 1, 2019, 1:05 P.M.

2 * * * *

3 THE COURT: Good afternoon. This is Judge Benitez.
4 How are you?

5 MR. BRADY: Yes, Your Honor. Sean Brady here on
6 behalf of plaintiffs. Good afternoon to you.

7 MR. RICHARDS: And good afternoon, Your Honor. Nelson
8 Richards here for the defendant, Attorney General.

9 THE COURT: All right. Well, good to hear from both
10 of you again.

11 So I asked for this status telephone conference so
12 that we could kind of see what was going on with the case. I
13 noticed that the Attorney General filed something on Friday, I
14 believe. I have tried to go through it -- it has a lot of
15 statistics and information -- and I've tried to glean what I
16 could from it in the short amount of time that I've had to look
17 at it.

18 But I don't know -- Mr. Brady, have you had a chance
19 to look at this, the filing that was filed on Friday?

20 MR. BRADY: We have, Your Honor.

21 THE COURT: Okay. All right. So I'm not in a
22 position today, just so that we all understand, to make a
23 substantive decision on this, but I wanted to make sure that
24 things weren't going to fall through the cracks. I had asked
25 for some additional information to be provided by the state.

1 Now, this filing has raised some questions in my -- in
2 my mind, and I just want to -- I just want to make sure
3 that -- that I'm understanding -- to the extent that I
4 understand any of it, I want to make sure that I'm
5 understanding it correctly.

6 So, Mr. Richards, I know you're not the one who filed
7 the declaration, but I suspect that you were very much involved
8 in the drafting, so you're somewhat familiar with what's in
9 this.

10 But now, as I understand this, 80 percent of the
11 people that applied using the AFS system were rejected; is
12 that -- do I have that right?

13 MR. RICHARDS: No, Your Honor. That 80 percent number
14 represents a percentage of people who were rejected. So, about
15 20 percent of the AFS background checks in July and August were
16 rejected. And then, of that 20 percent, we broke down the
17 numbers for the reasons why those rejections occurred.

18 THE COURT: Okay. By the way, I meant to tell you,
19 this is being reported. And so if you would identify yourself
20 whenever you speak, I really would appreciate that, okay.

21 So is it the 80 percent --

22 MR. RICHARDS: Your Honor, this is Nelson Richards.
23 Perhaps I can just give you -- try and clarify here.

24 THE COURT: Sure.

25 MR. RICHARDS: Using the July -- using the July data,

1 and I'm going to speak in sort of rough numbers, Ms. Morales'
2 August 2nd declaration that we submitted to the Court back in
3 August outlined the total number of AFS checks, also called
4 standard ammunition eligibility checks.

5 THE COURT: I'm sorry, what did you call it?

6 MR. RICHARDS: An AFS check or a standard ammunition
7 eligibility check.

8 THE COURT: Standard ammunition eligibility check,
9 okay, all right, which is actually the AFS system, which I call
10 it the short -- the short, quick system. Okay. Go ahead.

11 MR. RICHARDS: Yes, sure. That's a good shorthand,
12 Your Honor, yeah.

13 THE COURT: All right.

14 MR. RICHARDS: And so looking at Ms. Morales'
15 August 2nd declaration, there were about -- I don't have it
16 right in front of me, but I believe there were about
17 50-some-odd-thousand submissions to the AFS system. I think
18 this is repeated, actually, in the supplemental declaration, as
19 well, on page 7, table 2.1.

20 THE COURT: Okay.

21 MR. RICHARDS: And so you'll see there were 57,000 AFS
22 checks processed in July 2019. Of that 57,000, 46,702 were
23 approved.

24 THE COURT: Wait, wait, wait. You went too fast for
25 me. So let me find -- okay. So you're looking at the page 8

1 of 15; is that what you're looking at?

2 MR. RICHARDS: Correct. On the ECF numbering, it's
3 page 8 of 15. On the document numbering, it's page 7.

4 THE COURT: All right. So up at the top, it says:
5 57,553 AFS checks were processed; and, out of those 46,000 were
6 approved, 10,837 were rejected.

7 MR. RICHARDS: That's correct.

8 THE COURT: Which, according to my numbers, is
9 roughly -- what, that's roughly 20 percent?

10 MR. RICHARDS: Thereabouts, Your Honor, yes.

11 THE COURT: Okay. So 20 percent of the people that
12 applied were rejected?

13 MR. RICHARDS: Using the AFS check, that's correct.

14 And as we understood Your Honor's question at the
15 August 19th hearing, you asked us to provide an explanation for
16 those rejections. And that's primarily the focus of this
17 supplemental declaration.

18 THE COURT: All right.

19 MR. RICHARDS: To describe the 10,000 number, and also
20 to update the numbers for August as well.

21 THE COURT: Right. And I appreciate that, by the way.
22 And thank you, Mr. Richards. Your cooperation is certainly
23 welcomed.

24 Okay. Now, out of that 57,553 applicants who were
25 processed through the AFS system, 14 of those were found to be

1 prohibited persons.

2 MR. RICHARDS: That's correct, yes.

3 THE COURT: All the others, apparently, were rejected
4 because their names didn't match, their addresses didn't
5 match -- that's it, right?

6 MR. RICHARDS: Yes, Your Honor. This is Nelson
7 Richards, again.

8 The -- those that were rejected, about 30 percent, so
9 about 3,300 of that 10,000 number, there's no corresponding AFS
10 entry that we can identify, which means that those rejections
11 were most likely mistakenly submitted AFS checks.

12 So the actual number of transactions that were
13 rejected that could be tied with some degree of certainty to an
14 actual AFS entry is more on the order of about 7,000.

15 THE COURT: Okay. But -- but the point -- I guess the
16 point I'm trying to make is -- or I'm trying to understand is
17 this: So the average gun owner out there who wants to acquire
18 ammunition goes to the store. And he or she may have purchased
19 a gun in the past, and then he or she wants to buy ammunition.
20 And they say, well, here's my dollar, I want to buy the
21 ammunition. And out of those people that would show up,
22 20 percent of them would be rejected, if I understand these
23 numbers correctly, right?

24 MR. RICHARDS: This is Nelson Richards. That is a
25 close approximation.

1 The number of checks processed versus the number of
2 individuals who requested checks, there may be some difference
3 there, and that's discussed later in the declaration.

4 So, for example, this 10,837 number in table 2.1 in
5 the supplemental declaration, that doesn't directly correspond
6 to individuals. We think that number is somewhere around
7 9,000, meaning some people tried twice.

8 THE COURT: Okay.

9 MR. RICHARDS: But I think, speaking in generalities,
10 we can say that, you know, roughly 20 percent of people who
11 came and requested to have an AFS check processed had that
12 check --

13 THE COURT: And out of all of those people, out of all
14 of those people, 14 percent were actually prohibited persons --
15 I mean, 14 people were prohibited persons.

16 MR. RICHARDS: That is correct, yeah.

17 THE COURT: Okay. Now, we don't know actually how
18 many of those 14 that are considered prohibited persons
19 actually turned out to be prohibited persons because, as we see
20 in the declaration later on, there are people who have been
21 classified as prohibited persons who really should not have
22 been prohibited persons in the first place, right?

23 I think I calculated out -- hopefully, I can read my
24 own notes, which is not an easy thing.

25 So in paragraph 45, they talk about the fact that

1 there were 289 purchasers -- and these are not just AFS
2 purchasers, these are total purchasers, I guess -- that the
3 department reviewed as of some date. So there were 289
4 purchasers who were found to be prohibited persons.

5 Now, out of those 289, the department reviewed 45. So
6 that's -- if I understand that correctly, 45 of the 289 means
7 that 15 percent were reviewed. And out of that 45, it appears
8 that at least 20 percent were found to be ineligible, but were
9 then found to be eligible.

10 So if I apply that same number -- which I'm not saying
11 this is an absolutely crystal clear or absolutely accurate way
12 to calculate this -- I would say that probably 20 percent of
13 those 14 in July that were found to be prohibited persons would
14 not be prohibited persons, right? Does that make sense?

15 MR. RICHARDS: This is Nelson Richards, again.

16 I understand what Your Honor is saying. If you pull
17 that number back and apply it to July, that would be an
18 inference that you could maybe draw from doing that, not
19 knowing specifically with regard to those 14, yes.

20 THE COURT: So we're really looking at about 11, 11
21 people. So the AFS system was able to identify 11 people out
22 of 57,553 applicants that went through the AFS process who
23 would have actually been prohibited persons.

24 I didn't do the same math on the August dates, but I
25 would say it appears that the numbers are pretty comparable.

1 There were 101,058 people who went through the AFS process in
2 August, and 28 people were found to be prohibited persons. I
3 think that's about the same ratio or the same number, right?

4 MR. RICHARDS: I think so, yes, Your Honor.

5 THE COURT: Okay. I've got a question for you
6 that -- something that jumped out right -- you know, jumped out
7 when I was looking at this.

8 Again, looking at page -- I'm sorry, paragraph 45.

9 MR. RICHARDS: Okay.

10 THE COURT: It says, "The department has reviewed
11 approximately 45 of the 289 purchasers that were denied in July
12 and August on the grounds of prohibiting offenses, mental
13 health commitments or restraining orders. Four purchasers were
14 subsequently determined to have been eligible to purchase
15 ammunition at the time of purchase."

16 And then it goes on and lists the others that were
17 ultimately determined to be eligible.

18 Now, I have a question for you. It
19 doesn't -- interestingly, there's a category of people that
20 would be prohibited from owning firearms. And those would be
21 illegal aliens or people who are unlawfully present in the
22 United States. And for some reason, that's not included
23 in -- in this review. And I was wondering why, since -- since
24 the CCRs make it mandatory, essentially -- or not mandatory,
25 but make it almost -- almost necessary that you have a real ID

1 in order to buy ammunition. And the reason for that, we're
2 told, is because they want to prohibit people who are
3 unlawfully present from buying ammunition.

4 And so I'm wondering why the department did not
5 analyze how many people of the prohibited persons were
6 prohibited because they were unlawfully present.

7 Do you know, Mr. Richards?

8 MR. RICHARDS: This is Nelson Richards, Your Honor.

9 No, I do not know the answer to the question of how
10 many or whether any people were identified who attempted to
11 purchase ammunition who were unlawfully present in the United
12 States.

13 I can tell you, we did not look at that issue because
14 it, frankly, didn't come up at the hearing directly. It's
15 something that I think we could look into and get back to Your
16 Honor about that.

17 I would add, though, that it's highly unlikely that
18 any of those people would have attempted to do an AFS check
19 because they would have had to have undergone a background
20 check to purchase a firearm that would have got them into the
21 AFS system. So those people likely would have fallen in the
22 group of prohibited people who attempted to use the basic
23 check. And, again, to my knowledge, I'm not aware of anyone
24 having done that, but I think that that may just be the
25 accuracy of the regulation.

1 If you have to have a real ID, or an ID plus whatever
2 documentation is required by the regulation that we discussed
3 at the hearing, those people wouldn't even make it into the
4 system because the check wouldn't be run. The dealer wouldn't
5 be able to run the check for them. So there wouldn't
6 necessarily be any records of those people because they
7 wouldn't be able to meet the ID requirements.

8 So I'm not sure that there is actually a way to
9 identify undocumented people at the back stage of the process
10 on the prohibited persons list because they would need to be
11 using some form of fake ID or straw purchaser or something
12 along those lines to even end up in the system.

13 THE COURT: Do you have to -- in order to go through
14 the AFS system, do you have to present some form of
15 identification?

16 MR. RICHARDS: Yes. Again, this is Nelson Richards,
17 Your Honor. The same identification requirements apply to all
18 three types of background checks.

19 THE COURT: Okay. So something -- so then,
20 essentially, there's a -- there's an error in these statistics,
21 and that is that there may be a number of people -- we don't
22 know what that number would be -- that were essentially
23 rejected from buying ammunition who would otherwise -- you
24 know, all things being equal, assuming that they're here
25 legally, assuming that they don't have convictions and so

1 on -- but there's a number of people who would have -- who
2 would have tried to purchase ammunition and tried to go through
3 the AFS system, but they would not show up in the statistics.
4 In other words, they would not show up in that 57,000 or a
5 hundred-and-some-odd-thousand number because they would have
6 never gotten there in the first place, because if they didn't
7 have a real ID driver's license when they showed up to buy the
8 ammunition, the vendor would have said, sorry, I can't run this
9 for you because you don't have the appropriate identification.

10 Does that make sense?

11 MR. RICHARDS: This is Nelson Richards, Your Honor.

12 Yes, I understand what Your Honor is saying. I
13 believe it's a bit more complicated than that. You can use
14 either a California ID issued before 2016, which doesn't have
15 the real ID notification or federal limits apply notification
16 on it, or you can use a real ID, or you can use a federal
17 limits apply ID with the additional documentation required by
18 the regulations such as a passport.

19 What Your Honor is suggesting is --

20 THE COURT: No, I understand what you're saying. But
21 so, for example, my ID says federal limits apply. My
22 California driver's license says federal limits apply. So if I
23 show up at a vendor with my federal limits apply driver's
24 license, and I say to them, I want to buy a box of .30-06 ammo,
25 they would say, well, I can't do a background check on you, I

1 can't do it through the AFS, I can't do it through the default,
2 and I certainly wouldn't be able to do it with the third
3 system, that is, the one where you buy the weapon
4 simultaneously with the ammunition, right?

5 So there's a whole group of people that may show up at
6 vendors that have been rejected by the vendor, in other words,
7 have been told, sorry, I can't sell you the ammunition that you
8 want because what you have is a federal limits apply driver's
9 license, and we can't run it unless you have a real ID driver's
10 license or some other acceptable ID, right?

11 Do you follow what I'm saying?

12 MR. RICHARDS: This is Nelson Richards, Your Honor.

13 Yes, that is correct. We don't know what that number
14 of people is who have attempted to purchase, or, by the same
15 token, who have come in and experienced this narrative Your
16 Honor is talking about. They have a federal limits ID. They
17 come in and are told that they need to bring their supplemental
18 documentation, and then they subsequently come back with the
19 passport or the birth certificate or whatever other acceptable
20 form of supplemental documentation they're going to use, and,
21 in fact, purchase the ammunition.

22 THE COURT: Right.

23 MR. RICHARDS: I think this, actually -- this point
24 has a similar point that I believe we tried to make at the
25 hearing as well. This is also true with regard to prohibited

1 people. We don't know how many prohibited people are
2 essentially rejected or denied because they're not even
3 attempting to engage in the process, that is, in fact,
4 the -- you know, we could call it the group who's just deterred
5 from entering the gun store in the first instance. That is an
6 important and significant number, but one that we don't have
7 direct data on. But it's similar to the number that Your Honor
8 is talking about.

9 And all this to say, there are numbers out there which
10 we don't have anywhere near the precision that we do have for
11 the people who went through the process and are in the system
12 that we reported in the two declarations submitted by
13 Ms. Morales.

14 THE COURT: All right. And in order to go through the
15 AFS system, you have to -- if you're the owner of a long gun,
16 you have to have bought the weapon after January 1, 2014; but,
17 if you owned your long gun before January 1, 2014, you would
18 not be able to use the AFS system; is that correct?

19 MR. RICHARDS: This is Nelson Richards.

20 Without taking further steps, Your Honor, yes, that is
21 correct.

22 However, as I think we discussed at the hearing, I
23 think it's in this declaration, the supplemental declaration,
24 as well. There is a process by which the hypothetical long gun
25 owner that you're discussing can obtain an AFS entry for that

1 firearm and then use it as a basis for purchasing ammunition,
2 with a form that's available on the department's website that
3 can be filled out and submitted and will result in an AFS entry
4 that can then be used for an AFS check ammunition purchase.

5 THE COURT: Okay. Now, do I understand this
6 correctly, that for the default background checks, the average
7 amount of time that it takes to get that default background
8 check is over a day?

9 MR. RICHARDS: This is Nelson Richards, Your Honor.
10 Yes, that is correct. I believe those numbers are
11 reported in table 1.2 on ECF page 5 of Ms. Morales'
12 supplemental declaration.

13 THE COURT: So this kind of factors in a little bit,
14 in my mind, about the idea that these statutes may violate the
15 dormant commerce clause. So if -- so if I want to have ammo
16 shipped to me from -- oh, I don't know -- XYZ corporation in
17 Michigan, it has to come to a vendor in the state of California
18 that will accept the ammo. Then I have to go in, and I have to
19 do a face to face. Then they have to run the background check.
20 And then the background check takes on average a day or more,
21 so then I'd have to go back to the vendor a second time in
22 order to find out whether or not I have been approved or not
23 approved. And if I have been approved, then I get to purchase
24 my ammunition or to take it home. If I've not been approved,
25 then I have to go through all of the other possible steps in

1 order to get approved to buy my ammo, right?

2 MR. RICHARDS: This is Nelson Richards, Your Honor.

3 I think there was a lot there. I don't think what
4 Your Honor is suggesting is necessarily wrong, but I'd like to
5 clarify, in that hypothetical, if the person who's going to be
6 purchasing that ammunition is using the basic check, they would
7 order it, have it delivered to their local licensed ammunition
8 vendor, and then they would need to do the face-to-face
9 transaction in which the basic eligibility check was run.

10 Depending on the scenario, that may take anywhere from
11 a couple hours to a day or more. As detailed later in the
12 declaration, I believe, on the following page, on ECF page 6 in
13 table 1.3, there's different ways that the basic check can
14 proceed.

15 If the person in the hypothetical situation has some
16 sort of entry in one of the four state databases that are
17 checked to determine whether a person is prohibited, it
18 requires additional investigation and will require a manual
19 check by the department. That process could take a day or
20 more. If the checks run automatically, meaning the person has
21 no entries or hits in any of those systems, then the check is
22 on the order of an hour or so.

23 And so there's some variability there. But if you're
24 talking about just on average, it would be about a day. And I
25 think that that purchaser would be able -- they receive,

1 basically, a transaction number when the background check is
2 run. So they can check -- using the department's CFAR system,
3 they can go online and check to see, I think, the status of
4 their background check before going back in.

5 Again, I think I'd have to double-check that, but I
6 believe we talked about that at the hearing, and I think that
7 would apply in this particular scenario that Your Honor is
8 talking about. But they would need to go in, potentially,
9 twice. That is correct.

10 THE COURT: And if there's hits, and the person has
11 to, for whatever reason, go through the CFAR's website and get
12 that all taken care of and corrected, then, of course, the
13 person would have to make at a minimum a third trip to the
14 vendor, assuming -- to see if the problems have been resolved,
15 right?

16 MR. RICHARDS: This is Nelson Richards, Your Honor.

17 Just to clarify there, there's sort of two
18 possibilities. If there's hits in -- if they're using the
19 basic ammunition eligibility check, the basic check, the hits
20 in the system would process and be reviewed by the department
21 staff, by bureau analysts, who would go through.

22 For example, if someone had been charged with a
23 felony, and there's no disposition of that felony in the
24 system, they would then need to contact the superior court in
25 the county where the matter is from to see if there's a violent

1 disposition and find out whether that person had been convicted
2 or not. I don't think on that side there's anything for the
3 purchaser to do.

4 If you're talking about an AFS check, that -- and the
5 person is rejected because there's a name mismatch or an
6 address mismatch, that's where they can go into the CFAR system
7 and update their record in a way that would allow them to have
8 the check run again.

9 THE COURT: But they have to do that,
10 Mr. Richards -- and I apologize, I don't mean to -- to seem
11 obtuse about this, but it sounds to me like, okay, so if I go
12 in, and I go through this AFS system, because I think I'm -- I
13 think I have a weapon that I've purchased that's in the AFS
14 system. I think that. So I go in. I give them the
15 information.

16 The only thing that happens is that the vendor then
17 says to me, you've been rejected, right? Or you've been
18 approved? One or the other?

19 MR. RICHARDS: Yeah.

20 THE COURT: The vendor doesn't say to me, you've been
21 rejected because your address doesn't match, or your ID number
22 doesn't match, or, no, you don't have a weapon in the AFS
23 system, right?

24 MR. RICHARDS: That's correct.

25 THE COURT: So now the purchaser has to go to the CFR

1 system and try to figure out what went wrong, why it is that he
2 or she was rejected. And we don't know how long that would
3 take to clear up, right?

4 MR. RICHARDS: This is Nelson Richards, Your Honor.

5 That is correct speaking at a fairly general level.
6 And I think, at this point, it bears repeating one of our
7 arguments that we made several times at the hearing on
8 August 19th, which is that starts to sound a lot like an
9 as-applied challenge. We have no plaintiffs here who have
10 complained of that specific problem. And we, as a result,
11 don't have data at the level of specificity that would allow us
12 to get good answers to those questions based on abstract
13 inquiries or hypotheticals.

14 And that is -- that is an issue, both with regard to
15 the nature of the claim that's been brought in this case and
16 the standard review for facial challenges, and it's also a
17 standing issue because there is no plaintiff who has alleged
18 that they've experienced this particular harm.

19 THE COURT: Well, I understand. But, look, I'm trying
20 to work through something that's pretty complicated. I think
21 you'll agree that this is all pretty complicated, right?

22 So the CFRA's form, for example, is on -- is on the
23 website. It's available to anyone. So my courtroom deputy, my
24 law clerk, myself, we could all go look at that, right? You
25 agree, right?

1 MR. RICHARDS: That's correct, yes.

2 THE COURT: And if you look at it, it's got some
3 pretty complicated stuff, right?

4 So -- and if you look at the statutes, and you look at
5 the CCRs, it's kind of complicated. So I'm just trying to work
6 my way through trying to figure out how -- how -- how this
7 whole thing comes together.

8 And so getting back -- getting back to my question, so
9 when the person shows up and says, here, I want to apply
10 for -- I want to buy ammunition, I want to give you my dollar,
11 I want to go through the AFS system, I don't want to go through
12 this background system, I don't need to, I've purchased a
13 firearm, and so I should be able to go through this AFS system,
14 but they're never told what the problem is. So they walk away
15 shaking their heads and wondering, well, you know, what
16 happened?

17 And now they have to go through this remedial process.
18 And what you're saying to me, Mr. Richards, I guess, is that
19 you don't know how long that remedial process would take
20 because you just don't have the data for that, right?

21 MR. RICHARDS: Your Honor, this is Nelson Richards.

22 We don't know how long it would take because -- for
23 various reasons. I mean, we may have the data on a specific
24 person, but when you -- I'm not sure that there's a way to
25 generalize the data on that process.

1 The one thing I can point out -- and this is in the
2 supplemental declaration response to Your Honor's questioning
3 during the August 19th hearing -- and that is that a fairly
4 large number of the people who had AFS rejections have been
5 able to acquire ammunition as of August 31st.

6 For the July group, I think it was around 40 percent.
7 And for the August group, it was around 30 percent, which is,
8 you know, a much shorter time, because they only had from
9 August 1st to August 31st, as opposed from July 1st to August
10 31st. But the people who are being rejected, a large number of
11 them are able to go back and obtain ammunition using --

12 THE COURT: Well, I understand, Mr. Richards. But I
13 suppose that if I was Mr. Brady, I would say, no, no, what that
14 statistic actually shows is that there are a large number of
15 people who have not been able to resolve the problem, because
16 30 or 40 percent who have been able to fix it means that 60 or
17 70 percent have not been able to fix it, right?

18 MR. RICHARDS: Your Honor, this is Nelson Richards.

19 And with respect, I mean, that is -- it goes back to
20 the standing and the facial challenge issue. We don't know.
21 That would be speculative. We don't know why those people have
22 not gone through the system. We don't have anyone in this case
23 saying that they've attempted to do this and have been
24 unsuccessful.

25 THE COURT: But, look, look, Mr. Richards, I'm not

1 talking about -- there's a declaration that has been filed, and
2 I'm trying to get through it. I'm trying to figure out what
3 it's actually saying and what it means.

4 What it means to me right now, as I understand this,
5 when I read this declaration, here's what I understood
6 this declaration -- I didn't file this. It was filed, and I've
7 read it, and I'm trying to digest it.

8 What it means to me is that, roughly, so far, what
9 I've been able to glean from it, is that out of -- close to
10 160,000 people applied through the AFS system. That out of
11 those 160,000 people, roughly 20 percent have been rejected for
12 some reason or another. That out of those 160,000 people,
13 there were 42 people that were found to be prohibited people.

14 And that we also know that out of those -- the number
15 of people who were rejected -- and as we've agreed, we don't
16 know how many people just were rejected, but weren't really
17 rejected by the system. They were just simply told, no, you
18 don't have the right identification, and so we can't even go
19 through the system to check and see whether or not we can sell
20 you the ammunition. But what else we know is that 60 to
21 70 percent of the people have not been able to fix whatever the
22 problem was.

23 So it strikes me as kind of -- I don't know. It
24 strikes me as kind of odd that you've got a system that
25 basically says to you, you're rejected, but we can't tell you

1 why you're rejected, and please go over to our website over
2 here, and then see if you can fix it, and we'll get back to you
3 sometime and let you know when and if you'll ever be able to
4 buy ammunition again.

5 But that's -- those are questions that I have that, as
6 I was going through this declaration, I was -- I was thinking,
7 you know, that's a huge problem for people who -- most of whom,
8 it appears to me, are actually law-abiding people, right?

9 I mean, the statistics seem to confirm that most of
10 the people that, in fact, are being rejected are people who are
11 not prohibited people, right? And so they're having to go
12 through all of this. And there's this huge number of people
13 that are trying to buy ammunition that are lawful citizens, but
14 who are being prevented from doing so just simply because of
15 the complexity of the problem.

16 And so I understand that, and I appreciate the
17 declaration.

18 Now, Mr. Brady, I have sort of been grilling
19 Mr. Richards on this declaration simply because it's basically
20 his filing and his declaration, but I wonder if you have any
21 comments about it. As I said, I'm not prepared to make any
22 kind of substantive ruling on this yet, but I'd love to hear
23 your comments on anything that I've brought up or anything that
24 you've seen. Or if you want to file a responsive document, I'd
25 love to read that as well, and then maybe we'll have another

1 status conference and I'll grill you on it.

2 So -- so, do you have anything you want to talk about?

3 MR. BRADY: Sure, Your Honor. This is Sean Brady.

4 Because Your Honor is not prepared to rule
5 substantively, my intention today was to urge you to do so,
6 urge Your Honor to do so because I believe this declaration not
7 only confirms plaintiffs', you know, problems with this system,
8 but it actually shows that it's potentially worse than what
9 plaintiffs had believed.

10 And I'll go through those -- a few specifics, if you
11 would like, but I do think it would be --

12 THE COURT: Yeah, I would. I would very much like it.
13 That's why I asked for the status hearing, so.

14 MR. BRADY: Sure. But I'm -- the reason I preface
15 saying that is, I think that laying it out in writing would
16 probably be most useful for all of us, so that Mr. Richards can
17 address those, Your Honor can grill me, just like you are with
18 Mr. Richards.

19 But, you know, I think a couple of the -- just the
20 high level questions -- or high level points is that this
21 declaration confirms that -- I believe Your Honor -- and I
22 don't want to put word or thoughts in your mouth, but one of
23 the reasons that you've sort of delayed ruling on plaintiffs'
24 preliminary injunction motion was to determine whether the
25 numbers laid out in July, as far as denial rates and the issues

1 that plaintiffs raised, were anomalies based on the initial
2 rollout, or if it was an issue, or if these problems are baked
3 into the cake, they are inherent in the system.

4 And I think that it has proven, with the data from
5 August, that it is the system itself that is problematic. You
6 have not -- not only a -- there's not a lowering of the
7 rejection rates. There was a one -- over one percent uptick in
8 the number of rejections in August. And so I think Your Honor
9 has it -- has your finger on it with respect to how people can
10 remedy the issue.

11 If they do get a rejection, they essentially are left
12 guessing. You know, the declaration indicates that about
13 30 percent of the people wrongfully chose the AFS check. And I
14 think that raises the question, well, why are they not able to
15 determine whether they have an AFS record in the first place?
16 This is the government basically saying, pick a card -- you
17 know, when you show up to buy ammunition, to exercise your
18 fundamental right, pick a card, you know, the AFS check, the
19 standard check, or a COE.

20 I think most people know whether they have a COE or
21 not, so it comes down to the other two. And, you know, do you
22 want to pay one dollar, or do you want to pay 19 dollars? And
23 we're not going to tell you up front whether you have this. If
24 you want to find out, you can request that information from us.
25 And when I say us, I'm saying -- I'm putting myself in the

1 shoes of the California Department of Justice. The State is
2 saying, you know, fill out a form that has to be notarized, and
3 we'll get back to you at some point with whether or not you
4 have an AFS record.

5 And we do, indeed, have a plaintiff who is prepared to
6 submit a declaration that he's been waiting approximately four
7 months for the State to respond to him on what AFS records he
8 has.

9 THE COURT: Well, how about filing that declaration,
10 if it hasn't already been filed?

11 MR. BRADY: We're happy to, Your Honor.

12 THE COURT: See -- I mean, that sort of -- you know,
13 Mr. Richards makes some good arguments about the as-applied
14 challenge. And if you file the declaration, then perhaps
15 Mr. Richards will back off of that, and we won't have to deal
16 with that issue anymore.

17 So why don't you go ahead and file that.

18 MR. BRADY: Well, just to be clear, this particular
19 plaintiff is not in the position of not being able to acquire
20 ammunition. He didn't have any issues with his AFS check when
21 he went in. He was able to acquire ammunition.

22 I'm simply raising the point of somebody who does not
23 have an AFS record -- or does not know -- okay, this is the
24 issue, right, Your Honor alluded to it -- if somebody goes in
25 and is rejected, and they say, well, I know I have an AFS

1 record, I've lawfully purchased a handgun in the last 10 years,
2 but they don't know what their AFS record is, you have to -- in
3 going into the CFAR system, you have to know what your current
4 AFS record already said. And so if you don't have a copy of
5 your old paperwork, your DROS record, to know what your AFS
6 record says, you then have to order your AFS record from the
7 Department of Justice to know what your AFS record currently
8 says, and then make the fix to the -- the way it should be, if
9 that is the impediment.

10 And what I'm saying is that we have a plaintiff who
11 does not have that issue because he's -- his AFS records are
12 all squared away; but, he's requesting his AFS records, anyway,
13 and he has not heard a response for almost four months.

14 So a person who is not as fortunate as the plaintiff
15 to have his AFS records squared away could be waiting up to
16 four months just to be able to get the information to attempt
17 to fix their record. Then it goes into how quickly it is that
18 they can have the record actually fixed. Because my
19 understanding is then they submit it, and somebody at DOJ has
20 to review it and sign off on it.

21 So I raise this to point out that it is a -- there is
22 no indication, the state has provided no explanation for how
23 long it takes to remedy these problems.

24 We can brief whether it's a facial or as-applied
25 issue. I think we hashed this out somewhat in detail at the

1 hearing; but, you know, if Your Honor still has concerns about
2 whether this is an appropriate facial or as-applied challenge,
3 we're happy to explain why we believe it is an appropriate
4 facial challenge.

5 But I think, you know, in addition to -- to the fixing
6 of records, there is the issue of the amount of people who were
7 prohibited. I think it's crucial -- or who were denied as
8 prohibited. I believe Your Honor said that your reading of
9 this declaration is that 280 people were denied as prohibited
10 persons, but I don't think the declaration says that. I think
11 it says --

12 THE COURT: No, no, no. No, no, I'm sorry. Let me
13 interrupt you.

14 What the declaration says is that there were
15 289 -- well, let me read it, so that I don't have to misstate
16 it. But I believe it was paragraph 45 that says, "The
17 department has reviewed" -- what they have reviewed is
18 approximately 45 of the 289 purchasers --

19 MR. BRADY: Yes.

20 THE COURT: -- that were denied in July and August on
21 the grounds of being prohibited -- of prohibited offenses,
22 meaning mental health commitments or restraining orders.

23 Of course, it does not include that group of people
24 that we kind of would think we're somewhat concerned about
25 because the CCRs require that you have this real ID driver's

1 license. The reason for that is because, right, if you're a
2 person who's unlawfully present in the United States, you're
3 not allowed to have -- to buy or possess firearms or
4 ammunition, right?

5 So that --

6 MR. BRADY: Correct.

7 THE COURT: So that's 289 purchasers that were denied
8 in July and August for these reasons as stated in the
9 paragraph. And then they reviewed 45 of those 289, right, and
10 they found a number that were reviewed that ultimately were
11 found to actually -- should not be denied, right?

12 MR. BRADY: Correct. The point I wanted to make about
13 that number, about the 289 number, is that my
14 understanding -- if you look at page 4 of the declaration,
15 footnote 2 --

16 THE COURT: Just a second. Let me get to it. Just a
17 second. Just a minute.

18 MR. BRADY: Sure.

19 THE COURT: And what page of the file -- of the CM/ECF
20 document is that?

21 MR. BRADY: It is page 5 of 15.

22 THE COURT: All right. And you're looking at
23 footnote 2. All right. Got it.

24 MR. BRADY: Yes, Your Honor.

25 THE COURT: All right.

1 MR. BRADY: The very last sentence of that footnote,
2 it says, "If the department is unable to obtain the
3 information, it will ultimately deny the transaction because an
4 eligibility determination could not be made."

5 In other words, my understanding -- and perhaps I'm
6 misreading this and the declaration can be clarified, or
7 perhaps Mr. Richards has the information -- knows the answer to
8 this question, but I read that as saying that if a person
9 was -- could not be determined one way or the other to be a
10 prohibited person or not, they're just grouped into this
11 289 people of denied, not -- not rejected.

12 And if that's the case, that's enormously problematic,
13 not only because it then calls into question how many of these
14 289 people are actually prohibited; but, if that's what the
15 government is doing, the State is saying, oh, if you
16 can't -- if we can't figure out whether you're a prohibited
17 person or not, you're just not entitled to exercise your right,
18 that is, I think, confirmation that this system, or at least
19 that aspect of it, is -- is irreparably infirm in that that's
20 not the way rights work.

21 The government doesn't get to say, well, we don't
22 think you're entitled -- or you may not be entitled to exercise
23 your right, so we're just not going to let you. They have to
24 make an affirmative case. The burden is on them. The burden
25 is on the State to prove as to why an individual is not

1 entitled to exercise their right. And this sort of system gets
2 it backwards.

3 THE COURT: Okay. Anything else?

4 MR. BRADY: I have -- yes, I just want to point out
5 that, you know, if somebody walks in and does not have an AFS
6 record, and they want to create an AFS record, you know, they
7 have to pay a separate \$19 fee to create that AFS record, and
8 wait for the Department of Justice to process that application
9 to create that AFS record, which, in my experience -- and,
10 granted, this is obviously anecdotal -- it takes some time. It
11 takes about a month.

12 So it's -- even -- you know, to be -- of course, you
13 can say, oh, well, they can just -- you know, I think the
14 State's rebuttal is you can just do the \$19 fee, the basic
15 check, and wait a day or two -- or, you know, perhaps wait a
16 couple hours, depending. But, you know, that \$19, just to be
17 clear, the basic check, you pay the \$19, you undergo that
18 check, you have to do that every single time you want to buy
19 ammunition. It is not as if you do the basic check one time
20 for \$19, and then an AFS record is created. You have to do
21 that every single time.

22 THE COURT: Funny thing you should mention that
23 because that was something that I thought about when I was
24 looking at this. And I thought, well, wait a minute, wait a
25 minute, but if you do this basic background check, why doesn't

1 it spill over into the AFS system, so that you no longer have
2 to keep paying that \$19 and going through this basic background
3 check?

4 Mr. Richards, do you know the answer to that?

5 MR. RICHARDS: Your Honor, this is Nelson Richards.

6 I haven't specifically looked at that question, but I
7 think that the answer is that when you do the basic ammunition
8 eligibility check, what we're calling the basic check, there's
9 no firearm associated with that purchase.

10 So it's not clear how you -- the automated firearms
11 system, the AFS system, is a system that is based on firearms
12 entry. With no firearm in the basic check, there would be no
13 way to get into the AFS system, short of the way we described
14 in our filings, to make what you're suggesting work.

15 THE COURT: Well, let me ask you. You know, the
16 problem with this case is that the more questions that I ask,
17 the more questions that I think of. And I apologize. Maybe
18 I'm overthinking this.

19 Okay. So the way you get into the AFS system is that
20 you purchase a firearm -- if it's a long gun, you purchased it
21 sometime after January 1, 2014 -- or you have asked for an AFS
22 record to be created after you've gone into the CFAR'S website
23 and done all of that, right?

24 So what that says is this. Here's the way I
25 understand this. So let's assume, hypothetically, that I

1 bought a long gun on January 2nd, 2014. On January 1, 2014,
2 they do the background check on me. I do my 10-day waiting
3 period. I get my gun.

4 The background check, they've gone through NICS and
5 gotten my credible history at the time. And so now I am able
6 to go into one of the ammo stores and buy ammunition, right?

7 They run the AFS, and they've looked at my real ID
8 driver's license, and they see that I am in the AFS system.
9 Now, I can buy ammunition.

10 Do I have that right? Is that correct? Is there
11 anything that I've said that's not correct?

12 MR. RICHARDS: This is Nelson Richards, Your Honor.

13 I believe what you're saying is correct. And just to
14 make sure that I understand, the hypothetical you're positing
15 here is that someone purchases a long gun that is entered in
16 the AFS system at the time of the purchase, and they now, in
17 2019, want to come in and purchase ammunition. Can they rely
18 on the AFS check?

19 THE COURT: So let me ask you this, because -- you
20 know -- so, my understanding -- I mean, correct me if I'm
21 wrong, but my understanding is that if I'm here and I am a
22 legal resident, I can own and purchase a weapon, right?

23 MR. BRADY: This is Sean Brady, Your Honor. That is
24 correct.

25 THE COURT: Okay.

1 MR. RICHARDS: And, Your Honor, this is Nelson
2 Richards.

3 That is correct as far as the hypothetical goes,
4 assuming that you have no disqualifying --

5 THE COURT: Yeah, right. I mean, yeah, of course.

6 But my legal residency could be revoked or terminated
7 sometime between January 2nd, 2014, and today when I go buy
8 that ammunition, but the AFS check would not reveal that, would
9 it? Would not reveal that my legal residency has been revoked
10 or -- whatever it is they -- terminated or whatever, right?

11 MR. RICHARDS: Your Honor, this is Nelson Richards.

12 I don't know for sure. I believe it -- the way the
13 AFS check works is the purchaser comes into the licensed
14 ammunition vendor and presents the identification and --

15 Did we just have someone join the call?

16 UNIDENTIFIED SPEAKER: Your Honor --

17 THE COURT: Yes. Hello?

18 MR. RICHARDS: I apologize, Your Honor. I believe
19 someone may be trying to log into the phone number we've
20 provided, but it sounds like they have hung up.

21 THE COURT: Okay. All right.

22 UNIDENTIFIED SPEAKER: Hi, this is Amy.

23 MR. RICHARDS: This is Nelson Richards. We're on a
24 court call right now.

25 Your Honor, this is Nelson Richards. I apologize. I

1 believe that I scheduled this line through 2 p.m., and it
2 sounds like other people may be using it.

3 MS. HADDAD: Yes, this is Laura Haddad from Government
4 Law. I'll tell you what, I think we -- we usually -- we had
5 reserved this line, but it may have gotten lost.

6 So is anyone from Latham on the line? I can call one
7 of you back on one of your numbers. Is anyone from Latham on
8 this line?

9 MR. RICHARDS: Laura, this is Nelson Richards. I
10 apologize. We're actually on the record right now in a court
11 proceeding.

12 MS. HADDAD: Oh, I'm so sorry. I will get off. I
13 apologize. My apologies.

14 MR. RICHARDS: Judge Benitez, I apologize for this. I
15 hadn't noticed that the hearing had gone into the 2 p.m. hour.
16 I was not anticipating that we would carry on this long, and I
17 apologize for that. It sounds like this line has been maybe
18 reserved for another matter.

19 THE COURT: No problem. No apologies necessary. But
20 if you're going to apologize, I'll apologize for holding you
21 this long. But I'm sure you agree or you understand, this is
22 important. This is a really important issue. It's important
23 to a lot of people, and it's important to me because I want to
24 make sure that I make the right call.

25 So -- so getting back to my question, my question was,

1 okay, so the AFS system, if I bought a gun in January 2nd of
2 2014, they ran the background check on me at that time, I was
3 cleared, everything was great. And now, in 2019, October of
4 2019, I show up to buy some ammunition. They do the AFS, and,
5 sure enough, there it is. I do own a gun.

6 And so my question, Mr. Richards, is this: Would the
7 AFS check show, A, that my immigration status has been revoked
8 or terminated, or -- or, for example, that I have been
9 convicted of an offense since 2014, or that I've been found to
10 be mentally unfit by some court? Maybe I've been found to be
11 5150 under the Welfare and Institutions Code. Does any of that
12 show up in the AFS?

13 MR. RICHARDS: Your Honor, this is Nelson Richards.

14 It will show up in the AFS check. The way that that
15 works -- and, as I was starting to explain before we were
16 briefly interrupted there, the person comes into the store,
17 provides their identification, the AFS -- for an AFS check. It
18 proceeds in two steps.

19 The first step is to determine whether the
20 identification provided, the name, address, date of birth and
21 ID number match an AFS record. And if that is the case, that
22 record is then run against the APPS system, the Armed
23 Prohibited Person System. It's a database that tracks firearms
24 owners who have since become prohibited, so people who lawfully
25 purchase the firearm, much like you're describing, who have

1 since become prohibited. That system would determine whether
2 the person has been convicted of a felony or has had a mental
3 health hold -- Welfare and Institution Code 5150 commitment,
4 something along those lines. And so, to answer that part of
5 Your Honor's question, yes, that would be picked up in the AFS
6 check.

7 Specifically with regard to a person's immigration
8 status, I do not know the answer to that. My understanding is
9 that subsequent disqualifying or events that would make someone
10 prohibited are included in the APPS system, but I don't know
11 specifically whether a change in someone's immigration status
12 falls into that category. That's certainly something that I
13 can look into.

14 THE COURT: So the APPS system is an electronic system
15 that can be accessed. So if I go in and make an AFS
16 application, first of all, they're going to verify that my ID
17 is correct, my name is correct, my address is correct, yes,
18 that I do -- that I am in the AFS system. They're going to
19 check all of that.

20 And then it's going to go over into phase two. And
21 that is done where? Did you say it's the APPS system?

22 MR. RICHARDS: That's correct, Your Honor. This is
23 Nelson Richards. The A-P-P-S, the Armed Prohibited Person
24 System. And I believe that's described in Ms. Morales'
25 August 2nd declaration.

1 THE COURT: Now, let's assume, hypothetically, if you
2 will, that everything is fine. I show up. I've got my correct
3 ID. The ID matches my address, my name. And the AFS system
4 does, in fact, show that I am in the system, that I purchased
5 this long gun on January 2nd, 2014.

6 And now, does it automatically switch over to the APPS
7 system?

8 MR. RICHARDS: This is Nelson Richards.

9 That process is, as I understand it, simultaneous or
10 instantaneous. Once the AFS check is run, both steps proceed.
11 So long as the information on the identification documents
12 submitted to the licensed ammunition vendor matches the record
13 in the AFS system, it then automatically goes into the APPS
14 system to check to see whether that person is prohibited.

15 THE COURT: So if I have not been adjudicated to be
16 mentally ill or found to be 5150, I don't have any criminal
17 convictions, I don't have -- my immigration status has not been
18 revoked, instantaneously, going through the AFS check, I should
19 be approved, right? The vendor of the ammunition should be
20 able to come back to me within minutes and tell me, you're
21 approved, you can buy the ammunition; is that a fair statement?

22 MR. RICHARDS: This is Nelson Richards.

23 Yes, Your Honor, that is a fair statement. And I
24 believe that that is reflected in the numbers reported in
25 Ms. Morales' August 2nd declaration about the time it takes to

1 run the average AFS check. I believe, specifically, the check
2 portion of it takes about a second.

3 THE COURT: Okay. So, instantaneously, essentially,
4 by going through the APPS system, the APPS system will tell the
5 vendor that I do not have any criminal convictions or have been
6 adjudicated mentally insane or have any restraining orders
7 against me. Is that my understanding? I mean, is that
8 basically what I gather from the information you've just told
9 me?

10 MR. RICHARDS: This is Nelson Richards.

11 Yes, Your Honor. It tells the vendor that you're
12 eligible to purchase ammunition if you pass the AFS check.

13 THE COURT: Right. But what it tells you is that
14 you've looked at the APPS website, and it confirms that I don't
15 have any criminal convictions or restraining orders or my
16 immigration status has not been revoked, right?

17 MR. RICHARDS: Yes.

18 THE COURT: Okay.

19 MR. RICHARDS: And, again, just to clarify, it's
20 essentially a way of saying -- this is a longer way of saying
21 it, but when you purchased your firearm you went through a
22 background check that involved both the NICS check at the
23 federal level and a state check through the same state
24 databases that are used in the basic ammunition eligibility
25 check. And it's a confirmation that since that original check,

1 you --

2 THE COURT REPORTER: Can you please slow down.

3 THE COURT: Mr. Richards, I'm sorry, but you were
4 going too fast, and my reporter couldn't take down what you
5 were saying. So I hate to do this to you, but can you repeat
6 that for me, a little slower, please.

7 MR. RICHARDS: Yes, Your Honor. And I apologize to
8 the court reporter.

9 I was agreeing with what Your Honor said about when
10 you pass the AFS check, it essentially means that you don't
11 have any convictions or other disqualifying events such as
12 adjudication of -- a mental health adjudication.

13 But I just wanted to clarify, for purposes of keeping
14 the categories distinct here, that essentially what it means is
15 you went through a more complete background check when you
16 purchased your firearm, and this check is just confirming that
17 since the time of that purchase no disqualifying event has
18 occurred, which is what would get you in the AFS system.

19 So it's saying the same thing, but I just wanted to be
20 clear about how the process is working. It's not running you
21 through the four systems that you would run through if you did
22 a basic ammunition eligibility check, because the APPS system
23 exists to avoid doing that, and also for other reasons that I
24 think we discussed at the August 9th hearing. Those include,
25 you know, ensuring that people who are lawful firearms owners

1 who commit felonies, you know, convicted of felonies,
2 are -- that law enforcement knows about those people and is
3 able to identify them and investigate them and take their guns
4 away, if necessary.

5 THE COURT: Okay. And is there -- is there not a way
6 that the APPS system can be used -- so, I go in and I do my
7 basic check, my default check. And there's not any way that
8 then the APPS system can be used thereafter to determine
9 whether or not I have committed any offenses or have a
10 restraining order against me or have been considered to be
11 mentally ill? Is there something to prohibit the use of the
12 APPS system to confirm that?

13 MR. RICHARDS: This is Nelson Richards, Your Honor.

14 The APPS system is dependent on the AFS system. So
15 you have to have the firearm entry in the system for the APPS
16 system to function. So it gets back to needing to have a
17 firearm in the AFS for that system to work.

18 So there's no freestanding way that the APPS system
19 could work for just basic eligibility checks, unconnected to a
20 firearm ownership event that's in the AFS system.

21 THE COURT: Okay. Well, I think we've worked on this
22 enough for today. I think I'm going to want to hear live
23 testimony on this before I make a -- a call. But I'd like to
24 have some more data. I'd like to have at least -- let's see,
25 we had July, August, September, October.

1 MR. RICHARDS: Yes.

2 THE COURT: So why don't we plan on having one more
3 status conference sometime in early November. I'll schedule
4 it. And I would like to have the same information,
5 Mr. Richards -- and I really appreciate it, this is really very
6 helpful -- I would like to have the same information that was
7 provided in this filing sometime towards the -- the end of
8 October, if you don't mind.

9 And then I'll take a look at it. And then I think
10 what I'll probably do is I'll schedule a hearing, and we'll
11 take live testimony. Because I think some of these numbers
12 need to be explored more fully. And as we all know, as I think
13 Professor Brookstone said, cross-examination is the greatest
14 engine for ascertaining the truth. I think, perhaps,
15 questioning the folks that have submitted declarations and data
16 in this case would be helpful to the Court.

17 All right. So please file a supplemental. I'm going
18 to give you until November 1. How's that? November 1, where
19 you can give me information on September and October.

20 MR. RICHARDS: Your Honor, this is Nelson Richards.

21 I think we can certainly get you the September data by
22 November 1st. The October data will take a little bit longer
23 to prepare because we will only have the data once October
24 ends, and it does take some time to process that data,
25 somewhere on the order of a week to two weeks. This does

1 involve analysts going in and compiling data, running strips,
2 checking, double checking, making sure that the numbers are
3 accurate.

4 THE COURT: All right. How about November 15?

5 MR. RICHARDS: I think we can make that work. And if
6 something comes up, I'll let Mr. Brady know. But I certainly
7 think we'll be able to get the September numbers by that date,
8 and we will do our best to get you the October numbers by that
9 date. I think that is realistic --

10 THE COURT: So I'll be waiting -- November 15, I'll be
11 waiting to see your supplemental. I'll look at them. I'll
12 give you -- I'll set up a status conference. We can do it
13 again telephonically. I don't want to inconvenience either one
14 of you, if I don't have to.

15 And then the odds are pretty good that I will want to
16 set a -- an evidentiary hearing on the preliminary injunction
17 issue, okay?

18 Listen, I thank you very much. Mr. Richards, I really
19 appreciate your filing the supplemental. It's been helpful.
20 And I appreciate your answering all my questions because this
21 is complicated, to say the least.

22 Mr. Brady, I appreciate your being with us and raising
23 your issues as well.

24 So unless there's anything else, I'm going to conclude
25 our hearing today.

1 MR. BRADY: Your Honor, this is Sean Brady.

2 I believe there is one -- this raises the issue of
3 discovery cutoff, which Mr. Richards and I previously discussed
4 asking for an extension of the upcoming discovery cutoff in
5 light of this new information exchange and these new
6 declarations. And now that it's going to -- you know, we're
7 going to do essentially another round of this, I think it makes
8 it all the more, you know, reasonable to check out the
9 discovery cutoff date or suspend it until we can agree to one a
10 few months, I think, after this whole process.

11 You know, as Your Honor has, you know, shown
12 throughout this phone call, this raises all sorts of new
13 questions, both on our side and, you know, I imagine, the
14 State's side and Your Honor's side. So the discovery cutoff,
15 the current one is sort of hamstringing us to conduct real
16 thorough discovery. So, unless Mr. Richards objects, I would
17 like to request that we suspend the current discovery cutoff
18 date.

19 THE COURT: What is the -- remind me what the current
20 discovery date is. What is it?

21 MR. BRADY: I believe it's November 4th, which means
22 that, basically, we have to, you know, propound all of
23 our -- any additional discovery, like, this week. And we would
24 have to conduct all of our depositions, you know, this month,
25 having just received this information. Then, we're going to

1 get another round of information that could necessitate, you
2 know, deposing the same people a second time.

3 You know, I think it would be easier, more streamlined
4 for everybody, rather than, for example, you know, deposing
5 Ms. Morales now, based on this declaration, and then, you know,
6 having to recall her once we see the second round of
7 information, because there could be discrepancies, right, that
8 we want to ask about.

9 So I think it makes sense to kick it out past that.

10 THE COURT: Well, I agree with you in a sense, except
11 for, of course, this is sort of a rolling dataset. And so I
12 don't know that there would ever come a time when we would
13 really have the final data that we would be working with.

14 So I guess what I'm saying is there's going to come a
15 point where, for example, with interrogatories, you're going to
16 have to send the interrogatories out, and then we're going to
17 have to expect that there will be supplemental responses to the
18 original responses. And then, of course, it may be possible
19 that we do need to go a second round of depositions. Not in
20 all cases, but in some cases, there may be a second round of
21 depositions that's necessary.

22 But I hear you. I understand what you're saying. And
23 you're right, the current discovery date may be unrealistic.
24 So why don't I just cut that off, and let's -- let's think
25 about this when we have our next status conference. If maybe

1 the two of you can meet and confer and give me dates by when we
2 can -- you know, for discovery cutoffs, experts and so on.

3 I would like to have the evidentiary hearing on this
4 when everybody is reasonably well prepared. So I think it
5 would be a good idea to have most of the discovery done before
6 we do our hearing on the preliminary injunction.

7 So, I'll suspend the discovery cutoff date for now.
8 And then I want you to have a schedule for me, an agreed upon
9 schedule for me next time we talk, which will be sometime
10 probably in late November, okay? Agreed?

11 MR. BRADY: Perfect, Your Honor. Thank you very much.

12 MR. RICHARDS: This is Nelson Richards, Your Honor.
13 Thank you. We agree to that.

14 THE COURT: Thank you. All right. This hearing is
15 concluded.

16 (The proceedings concluded at 2:20 p.m., October 1, 2019.)
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1 COURT REPORTER'S CERTIFICATE

2
3 I, CYNTHIA R. OTT, Official Court Reporter, United States
4 District Court, Southern District of California, do hereby
5 certify that pursuant to 28 U.S.C. §753 the foregoing is a
6 true, complete and correct transcript of the stenographically
7 reported proceedings had in connection with the above-entitled
8 matter and that the transcript page format is in conformance
9 with the regulations of the Judicial Conference of the United
10 States.

11 DATED at San Diego, California, October 22, 2019.
12

13
14 /s/ CYNTHIA R. OTT
15 CYNTHIA R. OTT, RDR, CRR
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

<p>Kim Rhode et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>Xavier Becerra, in his official capacity as Attorney General of the State of California, et al.,</p> <p>Defendants.</p>

3:18-cv-00802-BEN-JLB

**SUPPLEMENTAL
DECLARATION OF MAYRA G.
MORALES IN SUPPORT OF
DEFENDANT XAVIER
BECERRA'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dept: 5A
Judge: Hon. Roger T. Benitez
Action Filed: 4/27/2018

DECLARATION OF MAYRA G. MORALES

I, MAYRA G. MORALES, declare:

1. I am a Staff Services Manager III for the California Department of Justice, Bureau of Firearms (hereafter generally referred to together as the “Department”). I make this declaration of my own personal knowledge and experience and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I understand that at the August 19, 2019 hearing on Plaintiffs’ motion for preliminary injunction, the Court requested additional information from the Attorney General. I have reviewed pages 132 through 135 of the transcript of the hearing. Based on that review, I see that the Court requested the following information:

- a. The reasons for the 10,837 Standard Ammunition Eligibility Check rejections in July 2019. (In this Declaration, I will generally refer to these checks as “AFS Checks.”)
- b. Whether those who were rejected have been able to acquire ammunition.
- c. Whether any of the prohibited persons prevented from purchasing ammunition are, in fact, not prohibited persons.
- d. The Court requested the same information for August 2019.

3. As part of my job duties, I can request data from the Department’s Application Development Bureau regarding ammunition eligibility transactions. I have obtained the data that the Court requested, with some additional data to provide context.

4. Across both July and August, the three most common reasons for AFS Check rejections were: (1) the address submitted by the vendor on the purchaser’s behalf did not match the address in the AFS system; (2) the purchaser likely did not

have an entry in the AFS system, meaning they elected the wrong eligibility check; and (3) the name submitted by the vendor on the purchaser's behalf did not match the name in the AFS system. Together, these accounted for about 80% of the rejections.

5. The number of purchasers who appear to have incorrectly used an AFS Check alone was about 30% of the total rejections in both months.

6. The other 50% of people who received an AFS rejection due to an address or name mismatch could update or correct their AFS record via the Department's website.

7. Of the individuals who had an AFS Check rejected in July or August, between 30% and 40% had successfully purchased ammunition by August 31, 2019.

8. These numbers, and others, are set forth in more detail below.

9. Section I of this declaration provides additional information on Basic Ammunition Eligibility Check (which I will refer to as "Basic Checks").

10. Section II provides information on AFS Checks for July and August 2019, including the total number of transactions, the number of approvals, denials, and rejections, the reasons for the rejections, and the number of people who were able to purchase ammunition after an AFS Check rejection.

11. Section III discusses the 289 people who were prevented from purchasing ammunition in July and August because they were determined to be prohibited based on Department records, including information that responds to the Court's question about whether any of those people were mistakenly denied.

I. BASIC AMMUNITION ELIGIBILITY CHECKS

12. Although I understand that the Court was primarily concerned with the rejection rates for AFS Checks, it bears noting that the default ammunition eligibility check is the Basic Check described in California Code of Regulations, title 11, section 4303. This check can be used irrespective of whether a purchaser

or transferee (I will generally refer to these together as “purchaser”) can take advantage of one of the other eligibility checks.

13. Under section 4303(B), a Basic Check costs \$19 and entails submitting identifying information, including the purchaser’s name, date of birth, current address, and ID number, to the Department’s Dealer Record of Sale (DROS) Entry System (DES). The process proceeds in two steps. First, the Department automatically checks the person’s ID or driver license number (I will generally refer to IDs and driver licenses as “IDs”), name, and date of birth, against DMV records to confirm the information submitted matches a DMV record and that the ID is valid. If the information matches, then the submitted information is automatically run through four state databases: (1) Automated Criminal History Record System (ACHS); (2) Mental Health Firearms Prohibition System (MHFPS); (3) California Restraining and Protective Order System (CARPOS); and (4) Wanted Persons System (WPS).

14. If a purchaser’s information results in no hits in the system, the Basic Check is processed automatically, meaning that Department employees are not directly involved in the process. If the purchaser’s information results in a hit in one of the four systems, the eligibility check will require manual review by a Department analyst. A manual review can take anywhere from a few minutes to days or weeks depending on the nature of the hit in the database. For instance, if the ACHS shows the purchaser was charged with a felony, but does not have a disposition of that felony, the manual check would entail tracking down the disposition, which can take at least several business days.

15. Table 1.1 lists the approvals, rejections, and denials for July and August.

Table 1.1: Basic Checks — Approvals, Denials, & Rejections¹		
	July 2019	August 2019
Basic Checks Processed	3,798	5,066 ²
Approved	3,607 ³ (94.97%)	4,827 ⁴ (95.28%)
Denied (Prohibited Persons)	119 (3.13%)	125 (2.47%)
Rejected (no match with DMV records)	22 (0.58%)	17 (0.34%)
Rejected (incomplete history)	50 (1.32%)	35 (0.69%)

16. Table 1.2 sets forth the average processing times for 3,709 Basic Checks that were submitted in July, and 4,542 Basic Checks that were submitted in August, that had eligibility determinations made on or before August 31, 2019.

Table 1.2: Basic Checks — Processing Times		
	July 2019	August 2019
Average Time	1 day, 17 hrs., 31 mins.	1 day, 4 hrs., 50 mins.

¹ This information is as of September 24, 2019, for transactions submitted in July and August 2019. The July numbers are different from what was provided in my August 2, 2019 Declaration in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 34-1 (August 2 Declaration), because subsequent action has been taken on the transactions since August 2.

² In August, 62 Basic Checks that were submitted were delayed. A Basic Check can be delayed for many reasons. Most often it is because a Department analyst must conduct additional research on an arrest cycle for a prohibiting event with a missing disposition. The Department will do its due diligence to obtain the necessary information. However, if the Department is unable to obtain the information it will ultimately deny the transaction because an eligibility determination could not be made.

³ One approved transaction was originally denied and subsequently approved. The statistic is counted only in the Approved status as to not double count.

⁴ Two approved transactions were originally denied and subsequently approved. The statistic is counted only in the Approved status as to not double count.

17. Table 1.3 lists the average processing times for Basic Checks that were manually and automatically approved in July and August. These numbers are a subset of the 3,709 Basic Checks that were submitted in July, and 4,542 Basic Checks that were submitted in August, that had eligibility determinations made on or before August 31, 2019.

Table 1.3: Approved Basic Checks — Processing Times		
	July 2019	August 2019
Automatically Processed	811 (22.63%)	1,041 (23.79%)
Average Time	2 hrs., 5 mins.	1 hr., 36 mins.
Manually Processed	2,773 (77.37%)	3,334 (76.21%)
Average Time	2 days, 2 hrs. 29 mins.	1 day, 12 hrs., 5 mins.

II. AFS CHECK (STANDARD AMMUNITION ELIGIBILITY CHECKS) INFORMATION FOR JULY AND AUGUST 2019

18. This section of my declaration provides the information that the Department has collected since the hearing regarding AFS Check rejections. Section II.A briefly recounts how the AFS Check works and provides the topline data for July and August 2019. Section II.B sets forth the reasons for the rejections. Section II.C provides information on purchasers who were rejected in an AFS Check in July or August who purchased ammunition on or before August 31, 2019.

A. AFS Check Approvals, Denials, and Rejections for July and August 2019

19. As set forth in more detail in paragraphs 13-24 of my August 2 Declaration, an AFS Check allows a person who owns a firearm and who has an entry in the State's Automated Firearms System to use that entry to establish their eligibility to purchase ammunition, rather than relying on the databases used in a Basic Check (described in paragraph 13, above).

20. If all the information matches an AFS entry and the purchaser is not in the Armed Prohibited Persons System, then the transaction will be approved. If the person is in the armed Prohibited Persons System, the transaction will be denied.

21. A purchaser who has an AFS Check rejected and is otherwise eligible to purchase ammunition may do one of four things.

22. First, in many scenarios the purchaser may use the California Firearms Application Reporting System (CFARS) to update their AFS personal information to correct the cause of the mismatch. This process is set forth in paragraphs 20-24 of my August 2 Declaration and is also described on the Department's website at: <https://oag.ca.gov/firearms/afspi>.

23. Second, if the purchaser owns a firearm that is not in AFS, the purchaser may submit a Firearms Ownership Report using the form available on the Department's website at <https://oag.ca.gov/firearms/forms> or by submitting the form electronically through CFARS at <https://cfars.doj.ca.gov/login.do>. Once the report is processed and approved, this will result in an AFS entry for the purchaser that can be used to purchase ammunition.

24. Third, the purchaser can purchase a new firearm, which will allow them to purchase ammunition at the same time, and also create an AFS entry that can be used for future ammunition purchases.

25. Alternatively, these purchasers may elect to rely on a Basic Check, or, if they have a COE, they may rely on a COE Check.

26. Table 2.1 sets forth the July and August 2019 approvals, denials and rejections for AFS Checks.

Table 2.1: AFS Checks — Approvals, Denials, & Rejections		
	July 2019	August 2019
AFS Checks Processed	57,553	101,058
Approved	46,702	80,811
Denied (Prohibited Persons)	14	28
Rejected (no match with AFS records)	10,837	20,219

27. As noted in the tables, denials occur when official records identify the purchaser as a prohibited person who cannot lawfully possess a firearm or ammunition. A rejection occurs when the purchaser does not match an entry in AFS. The reasons for the rejections in July and August 2019 are set forth in more detail in the following section.

B. Information on AFS Check Rejections for July and August 2019

28. AFS Checks are a streamlined eligibility check that rely on the purchaser already having undergone a firearms background check and being subject to inclusion in the APPS system, in the event they later become prohibited. Determining whether a potential ammunition purchaser has an up-to-date AFS entry is therefore integral to how the AFS Checks work.

29. Under California Code of Regulations, title 11, section 4302, an AFS Check involves checking whether a purchaser has a valid entry in the State's Automated Firearms System. Under subdivision (c) of that regulation, to run an AFS Check, a licensed ammunition vendor collects the purchaser's name, date of birth, current address, and ID number, and submits that information to DES. The system then automatically checks whether the submitted information matches an AFS record, and, if it does, runs the purchaser's information against the Armed

Prohibited Persons System (APPS) database to determine whether the purchaser is a prohibited person.

30. If the purchaser's name, address, date of birth, or ID number, or some combination of that information, do not match an AFS record, the transaction is rejected. For example, a purchaser may submit an AFS Check in which their name, address, and date of birth match an AFS entry, but their ID number does not. Or, a purchaser might submit a check in which their date of birth and ID number matches, but their name and address do not. It is also possible that none, or only one piece of information matches an AFS entry.

31. A small number of purchasers had AFS entries, but those entries were no longer valid because the purchaser had transferred the firearm associated with the entry to someone else.

32. In both July and August, about one in three of the AFS Check rejections were for purchasers who it can reasonably be concluded do not have an AFS entry.

33. A large number of the rejections—over 50% of the total in both months—fell into one of two categories: (1) their address did not match an AFS entry but their name, date of birth, and ID number did; or (2) their name did not match an AFS entry but their address, date of birth, and ID number did. Both categories of people may use CFARS to correct their AFS information in a relatively short amount of time.

34. Table 2.2 summarizes the reasons for the AFS Check rejections for July and August, listing the reasons from most common to least common based on July and August data:

Table 2.2: AFS Checks — Reasons for Rejections				
	July 2019		August 2019	
Total Rejected	10,837		20,219	
Address Mismatch (name, date of birth, and ID number match)	4,077	37.62%	7,160	35.41%
No Identifiable AFS Entry (purchaser not eligible for AFS Check)	3,303	30.48%	6,563	32.46%
Name Mismatch (date of birth, address, and ID number match)	1,452	13.40%	2,563	12.68%
Name and ID Number Mismatch (date of birth and address match)	423	3.90%	774	3.83%
AFS Entry No Longer Valid (Name, Date of Birth, ID Number, and Address Match)	322	3%	576	2.85%
Name and Address Mismatch (date of birth and ID number match)	301	2.78%	671	3.32%
AFS Entry No Longer Valid (Partially Matched on a combination of Name, Date of Birth, ID, Address)	258	2.38%	522	2.58%
ID Number and Address Mismatch (name and date of birth match)	248	2.29%	497	2.46%
ID Number Mismatch (name, date of birth, and address match)	209	1.93%	383	1.89%
Date of Birth Mismatch (name, address, and ID number match)	148	1.37%	259	1.28%
Date of Birth and ID Number Mismatch (name and address match)	41	0.38%	124	0.61%
Date of Birth and Address Mismatch (name and ID number match)	34	0.31%	72	0.36%

Name and Date of Birth Mismatch (address and ID number match)	16	0.15%	28	0.14%
Name, Date of Birth, and Address Mismatch (ID number match)	5	0.05%	27	0.13%

35. The information in Table 2.2 is derived from Microsoft Excel spreadsheets that list the transaction number, date, time, place, ID type, and reason for each rejection. I understand that those spreadsheets, with individual identifying information omitted, are being produced to counsel for Plaintiffs.

C. Information on Purchasers Rejected in an AFS Check Who Later Purchased Ammunition on or before August 31, 2019

36. The Court also asked the Attorney General whether purchasers who were rejected were able to purchase ammunition later.

37. Answering that question requires determining how many unique people attempted to purchase ammunition using AFS Checks who were subsequently rejected. Given the volume of data, the best way to answer this question is to use unique ID numbers as proxies for individual people. While potentially imperfect at the margins, I believe this approach provides a reasonably accurate method for identifying individual purchasers.

38. The 10,851 rejections and denials in July correspond to 9,027 unique ID numbers. I understand that the primary difference between rejections and denials and unique ID numbers is largely because 1,824 individuals tried to use the AFS Check procedure more than once and were rejected or denied on more than one occasion. The 20,247 rejections and denials in August correspond to 16,037 unique ID numbers. As with the July numbers, I understand that the primary difference between rejections and denials and unique ID numbers is largely because 4,182 individuals tried to use the AFS Check procedure more than once and were rejected or denied on more than one occasion.

39. Table 2.3 provides the number of individuals who were rejected from an AFS Check but who were able to purchase ammunition by August 31, 2019.

Table 2.3: Purchasers Who were Rejected on an AFS Check and Subsequently Purchased Ammunition on or before August 31, 2019		
	July 2019	August 2019
Individuals Rejected in AFS Checks	9,027	16,037
Number Who Purchased Ammunition on or before August 31, 2019, after an AFS Check Rejection	3,468	4,923

III. PROHIBITED PERSONS PREVENTED FROM PURCHASING AMMUNITION IN JULY AND AUGUST 2019

40. The Court also asked the Attorney General to provide additional information about the purchasers who had been denied approval to purchase ammunition because they are prohibited. In particular, the Court expressed concern that people may have been considered prohibited who actually are not prohibited persons.

41. As reported in paragraphs 50 and 52 of my August 2 Declaration, 106 people in July were prevented from purchasing ammunition because Department records showed them to be prohibited. Since then, additional people who submitted eligibility checks in July have been prevented from purchasing ammunition bringing the total for July transactions to 134.

42. In August, the number thus far is 155, for a total of 289 persons denied from purchasing ammunition in July and August because they were prohibited.

43. The Department investigates attempts to purchase ammunition by prohibited persons. Data on specific denials is highly sensitive, and disclosing it outside the Department could impede or undermine ongoing criminal investigations.

44. With that concern noted, I have asked our law enforcement staff to provide me with general information on the denials. To give a sense of the reasons for some of the denials, I will provide a few examples. One person in the Central Valley who was denied had been committed under California Welfare and Institutions Code section 5150 in 2018. Another in the Central Valley had a 2016 misdemeanor conviction for battery on a spouse. One in southern California had a felony 2008 conviction for robbery. Some of the purchasers had older convictions: an attempted purchaser in the Los Angeles region with a 1984 burglary conviction, another in the northern California East Bay region with 1989 assault and battery conviction, and another in Orange County with 1980 conviction for assault with a deadly weapon.

45. I have also inquired whether, to the Department's knowledge, any of the people denied from purchasing ammunition because they were prohibited were, on a subsequent review, determined to not be prohibited. Determining whether this is the case is a labor intensive process. The Department has reviewed approximately 45 of the 289 purchasers that were denied in July and August on the grounds of prohibiting offenses, mental health commitments, or restraining orders. Four purchasers were subsequently determined to have been eligible to purchase ammunition at the time of purchase. In addition, five additional purchasers were ineligible on the face of their official records, but were later determined to be eligible after Department staff investigated the matter, contacted the appropriate courts, and requested that they update the official status of the individuals. As a result of these investigations—which are unrelated to this lawsuit or the Court's request for information at the August 2 hearing—those individuals are now eligible to purchase ammunition.

1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
2 is true and correct.

3
4 Executed on: September 27, 2019

5
6 
7 MAYRA G. MORALES

CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra** No. _____

I hereby certify that on September 27, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**SUPPLEMENTAL DECLARATION OF MAYRA G. MORALES IN SUPPORT OF
DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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 September 27, 2019, at Sacramento, California.

Tracie L. Campbell

Declarant

/s/ Tracie Campbell

Signature

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