

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 3 OF 7**

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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,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Before The Honorable Roger T. Benitez, Judge

KIM RHODE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. 18-CV-00802-BEN-JLB
	)	
XAVIER BECERRA, et al.,	)	
	)	
Defendants.	)	
_____	)	

San Diego, California  
Monday, August 19, 2019

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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Reported By: James C. Pence-Aviles, RMR, CRR, CSR No. 13059  
Official Court Reporter



Monday - August 19, 2019

11:00 a.m.

P R O C E E D I N G S

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**THE COURT:** Okay. Good morning.

**MR. BRADY:** Good morning, Your Honor.

**MR. RICHARDS:** Good morning, Your Honor.

**THE CLERK:** 3 on calendar, 18-CV-0802, Rhode, et al.,  
v. Becerra, et al., motion hearing.

**THE COURT:** All right. Counsel, please register your  
appearances for the record.

**MR. BRADY:** Good morning, Your Honor. Sean Brady on  
behalf of the plaintiffs.

**MR. RICHARDS:** Good morning, Your Honor. Nelson  
Richards for defendant.

**THE COURT:** Okay. So this morning, we have a motion  
for preliminary hearing -- or preliminary injunction to be  
issued against the State.

And there's considerable -- boy, is that an  
understatement -- considerable filings that have occurred in  
connection with this -- with this motion. I wish -- I wish  
there was some way to briefly summarize those, but I don't know  
that there is.

So, Mr. Brady, this is your -- your motion. So perhaps I  
should -- I should let you go first and tell me why you think I  
should grant your request for preliminary injunction.

1           **MR. BRADY:** Thank you, Your Honor.

2           I think that the large amount of filings that accompany  
3 these motions can be sort of described succinctly, and that is  
4 they describe an undue burden placed on the exercise of a  
5 constitutional right.

6           We're talking about the Government acting as a gatekeeper  
7 here, and in that gatekeeping capacity, it is denying a  
8 significant number of people their exercise of a constitutional  
9 right and, as far as plaintiffs can see, unnecessarily so.

10          We're talking about a system that, in one month, has  
11 resulted in approximately 18 percent of the people who undergo  
12 the background check system not being able to proceed to  
13 acquire ammunition.

14          Of -- of those people who are denied, according to the  
15 State's own evidence, you can -- to make things even more  
16 simple for Your Honor, I think you can almost wholly ignore  
17 plaintiffs' evidence that they brought at the outset because  
18 the State's evidence corroborates and actually bolsters --  
19 makes the case even more so than what plaintiffs suspected was  
20 the case with the declarations from ammunition vendors.

21          You know, the State has confirmed that, you know, 11,000  
22 individual -- almost 11,000 -- I don't want to exaggerate.  
23 It's 10,000 and change -- individuals were unable to acquire  
24 ammunition.

25           **THE COURT:** As I recall, there was 106 prohibited

1 persons out of -- out of -- out of that 62- or 63,000  
2 applications. There were 106 prohibited persons.

3 **MR. BRADY:** According to the State, Your Honor. And,  
4 of course, we do not have -- plaintiffs do not have access to  
5 that information to corroborate it. I have no reason to  
6 suspect why Mr. Richards or the State would not be telling the  
7 truth on that matter. However, I do think that's -- that  
8 number --

9 **THE COURT:** Where did you get the number?

10 **MR. BRADY:** The 106?

11 **THE COURT:** Yes.

12 **MR. BRADY:** That is from the State's declaration.

13 **THE COURT:** Okay. All right.

14 **MR. BRADY:** Yes.

15 And so that's where that -- they say that they stopped 106  
16 individuals in one month who are prohibited persons. That  
17 number, I think, can -- will come down upon a scrutiny, how  
18 much so, whether it will be, you know, eight of those people  
19 were not prohibited or 80 of them were not.

20 One of the big issues here -- and this goes perhaps a  
21 little bit beyond this case, but generally -- is the Bureau of  
22 Firearms' records are not so reliable, particularly the system  
23 that this particular background check system relies on, the  
24 Automated Firearm System. It is renowned for having --

25 **THE COURT:** That's not the NCIS?

1           **MR. BRADY:** No. That is the federal system.

2           Now, the state system, when checking firearms, checks  
3           NCIS -- NCIS, but this system is not allowed to because federal  
4           law only allows firearm purchases to be -- to use -- to utilize  
5           the NCIS system, and this is ammunition.

6           So there --

7           **THE COURT:** Okay. Well, that was the question that I  
8           had.

9           All right. So, look, you guys have been living with this  
10          case a lot longer -- I mean, I've had the case for quite a  
11          while, but you folks have been working it up for a lot longer  
12          than I have. So I have lots and lots and lots of questions,  
13          but that was one question that I had, which was why is the NCIS  
14          system not used.

15          Okay. Got it.

16          **MR. BRADY:** So, you know, to get back to the original  
17          point as far as what all these filings show, I think it boils  
18          down to can the Government say -- let's assume that there are  
19          106 or so prohibited persons that were prevented from acquiring  
20          ammunition is accurate. Can the Government preclude 11,000  
21          people from -- non-prohibited people from acquiring ammunition  
22          and going through some process to ultimately potentially fix  
23          that?

24          I think that's a crucial point that needs to be  
25          considered, is that the State is claiming that this is just a

1 simple fix, that these people are temporarily denied, perhaps  
2 so, perhaps for some. For how many, we don't know, but --

3 **THE COURT:** What sorts of things would -- has the  
4 State told you what sorts of things might cause someone who's  
5 not a prohibited person from being rejected?

6 **MR. BRADY:** Yes, Your Honor. Yes, Your Honor.

7 The State gave one example in its briefing that perhaps  
8 the address on the person's Automated Firearms System record  
9 would be different than the address they have on their  
10 identification.

11 **THE COURT:** So then let me ask you this. So wouldn't  
12 that be a simple fix? I mean, if -- when the application is  
13 rejected, the applicant is told, "Your application is rejected  
14 because your address is not the same."

15 And then the person would be able to perhaps pull out a  
16 driver's license. Say, for example, they had moved since the  
17 time that they were first in the system, or maybe they used  
18 their office address, for example, on their driver's license,  
19 or maybe they have something else. So they could fix it right  
20 then and there.

21 Is that not a possibility?

22 **MR. BRADY:** I think it is for certain individuals, but  
23 that is assuming that the only issue is the address  
24 discrepancy, and that's an example that the State gave. But  
25 they said that, you know, that is something that's easily

1 fixed.

2 First -- first --

3 **THE COURT:** Okay. So then let's make sure I  
4 understand because, as I said, you folks know a lot more about  
5 this than I do.

6 So -- so I go in -- so, for example, since -- by the way,  
7 this database that's being used -- what is it? It's the --

8 **MR. BRADY:** The Automated Firearm System. It's  
9 essentially -- you know, the layman's terminology would be a  
10 firearm registration, if you will, although it's not a  
11 registration. It's just a record of the individual having  
12 acquired a firearm through a licensed firearm --

13 **THE COURT:** Federal or state?

14 **MR. BRADY:** State. This is a state database.

15 **THE COURT:** And how far back does it go?

16 **MR. BRADY:** Oh, boy. That is a -- that would be a  
17 historical question of some dispute, potentially back into the  
18 1920's, I believe.

19 **THE COURT:** Does it apply to long guns as well as  
20 handguns, or is it only handguns, or is it only long guns?

21 **MR. BRADY:** So once upon a time, it was only handguns,  
22 or it was long guns that people voluntarily registered.

23 **THE COURT:** Okay. So when did it become long guns?

24 **MR. BRADY:** It was -- so then there was long gun  
25 assault weapon registration. That's a separate class of long

1 guns that had to be put in as so-called assault weapons. And  
2 then after three iterations or so of assault weapons, I believe  
3 the beginning of 2014 was when the State started requiring that  
4 long gun transfers also --

5 **THE COURT:** What year was that?

6 **MR. BRADY:** 2000 -- January 1st, 2014, was when long  
7 gun transfers had to also be recorded in Automated Firearms  
8 System.

9 So prior to 2014, if you went in and bought a pump-action  
10 shotgun, that would not meet the -- the definition of an  
11 assault weapon. There would not be a record of that.

12 **THE COURT:** So then what would happen?

13 So let me give you an example. Say somebody bought a  
14 Remington 7-millimeter hunting rifle, and they bought it in  
15 2002, and now they go in to buy some ammunition.

16 All right. So what happens? What would -- what would  
17 happen?

18 **MR. BRADY:** So assuming that's the only firearm they  
19 own and they never registered it and it never made its way into  
20 the Automated Firearm System, which it would not other than  
21 some odd circumstances, for example, police having seized it in  
22 the interim -- but let's assume that that never happened.

23 **THE COURT:** Okay.

24 **MR. BRADY:** Then the individual would go to the  
25 vendor, and the vendor would say, "Okay. Here are your options

1 for a background check." You can do the instant background  
2 check, which is the Automated Firearm System search, but this  
3 person can't -- doesn't qualify for that.

4 Then the next one is "Do you have a Certificate of  
5 Eligibility"? If the person does not have a Certificate of  
6 Eligibility, which is a -- an item that people can acquire from  
7 the department for a -- they fill out an application. They pay  
8 a fee of up to -- I think the department's fees are somewhere  
9 in the 75-dollar range, and then there's usually a fee for the  
10 fingerprinting, which is required for the COE.

11 If they don't have the COE, then they have to do a  
12 full-blown background check that the State does for firearms.  
13 However, I don't think it's identical to the firearm background  
14 check system because, as we just discussed, they cannot access  
15 NCIS.

16 So I do not know the particulars. Perhaps Mr. Richards  
17 could better, you know, inform the Court about what happens on  
18 the full-scale background check, but that full-scale background  
19 check requires a 19-dollar fee. And potentially, the State  
20 says that it can take up to days for it to be processed because  
21 they have ten days to do a firearm background check -- excuse  
22 me -- under the law.

23 **THE COURT:** So the -- so the hypothetical I just gave  
24 you -- so that person would walk into -- I don't know -- say,  
25 Turner's or Big 5 or somewhere to buy some ammunition, say,



1 "Here, I want some ammunition." And because they bought a  
2 hunting rifle in 2000 or 2002 or 1995, they're not in this  
3 system.

4 And so then the person at the counter says, "Sorry. I  
5 can't give you" -- "I can't sell you this ammunition." There's  
6 no way they can't tell the person right then and there to do  
7 something to fix the problem immediately; is that correct?

8 **MR. BRADY:** No, Your Honor. So they would be able to  
9 undergo the full-scale background check, pay \$19, undergo the  
10 full-scale background check --

11 **THE COURT:** Right then and there?

12 **MR. BRADY:** Well, potentially. It could take hours.  
13 It could take days.

14 There's no set time on how long the full-scale background  
15 check would take because the instant background check, if you  
16 will, the one that is resulting in the address issues and all  
17 that, that relies on an Automated Firearms System, simply  
18 checks to see if the person is in AFS, the Automated Firearm  
19 System, and then checks to see if they're on the prohibited  
20 person list, which the State maintains through their Armed  
21 Prohibited Person Systems Database.

22 And if the person is not -- is in AFS and is not on the  
23 APPS database, then they're clear. They're good to go. But  
24 because this person does not have that AFS record, then they  
25 would have to undergo the full-scale background check and take

1 hours to days to -- to be able to acquire the ammunition and  
2 pay \$19 for potentially separate boxes of 7-millimeter ammo.

3 You know, to go deer-hunting, you need what, a box of, you  
4 know, ten -- ten rounds, costs 20 bucks, and here you are --

5 **THE COURT:** What?

6 **MR. BRADY:** -- accompanying that.

7 **THE COURT:** 20 bucks for 7-millimeter --

8 **MR. BRADY:** Well, remember, Your Honor, for hunting  
9 these days in California, you have to use non-lead ammunition.  
10 So it's probably a little bit more than that, yeah, but --

11 **THE COURT:** Okay. So can someone just walk into, say,  
12 for example, Big 5 and say, "Hey, I don't know if I'm in this  
13 AFS system. Can you check for me" without buying -- without  
14 buying ammo?

15 **MR. BRADY:** I believe they could. I believe they -- I  
16 think it would still be the dollar fee, and that's sort of the  
17 initial filter -- right? -- is "Okay. Here's the background  
18 check processes you could take."

19 "Okay. I'll check to see if I'm in AFS. I believe I am,"  
20 although a lot of people mistakenly believe they are because  
21 they are -- in the situation of the 7 -- the 7-millimeter  
22 Remington, many people believe, because they had to go through  
23 the California State's process of acquiring that rifle through  
24 a licensed dealer, fill out the DROS paperwork, fill out the  
25 4473, they believe that that gun had been registered in AFS,

1 even though it had not been under the law.

2 So a lot of people believe they are in AFS and end up not  
3 being. But yes, they would go and submit, and then the dealer  
4 would say, "Sorry. You do not qualify for AFS. Give me your  
5 one dollar for running that. Do you want to run" -- "do you  
6 want to do the full-scale background check for the \$19?"

7 **THE COURT:** And that could take days?

8 **MR. BRADY:** Hours to days.

9 **THE COURT:** Okay. All right. I interrupted you.

10 **MR. BRADY:** It's okay.

11 **THE COURT:** I have a million questions.

12 **MR. BRADY:** I understand, Your Honor.

13 **THE COURT:** We're just getting started. So --

14 **MR. BRADY:** I understand, Your Honor, and I think that  
15 in and of itself is indicative of the issue here.

16 We are talking about such a clunky system, and the State  
17 wants to talk about the attributes of background checks  
18 generally; right? They tout the benefits of the federal  
19 background check system and the City's, but we're talking about  
20 this system, and this system relies on the Automated Firearms  
21 System for -- and we're not even sure it needs to.

22 I have yet to -- the State has yet to make its cases to --

23 **THE COURT:** Well, what else would it be able to rely  
24 on if it can't rely on NCIS for ammunition?

25 **MR. BRADY:** I think -- sure. I think it can rely on

1 simply the -- the prohibited person systems side of the -- of  
2 the DOJ system. They have a list of -- so AFS is "Do you have  
3 a record of ever having acquired a firearm?" Then there's the  
4 prohibited person system list, which just is all your, you  
5 know, prohibited people, whether they've ever registered a gun  
6 or not.

7 **THE COURT:** So where's that come from?

8 **MR. BRADY:** The California Department of Justice  
9 maintains that, and I believe that it is populated via courts  
10 when somebody -- the people who were just in here getting  
11 sentenced. The Court will send a record to the California  
12 Department of Justice that this person is now a felon who's  
13 been convicted. Well, I think they've already been convicted.

14 So the record would go there, mental --

15 **THE COURT:** Would that disclose someone who's been  
16 convicted, say, in Alabama?

17 **MR. BRADY:** Probably not. Probably not.

18 **THE COURT:** Would the AFS system? Well --

19 **MR. BRADY:** They would probably not have a record in  
20 there. I don't even know if an individual could have -- a  
21 non-California resident could have an AFS record, which is  
22 another --

23 **THE COURT:** Well, what if you were a California  
24 resident, you acquire the firearm, went to Alabama --

25 **MR. BRADY:** Sure.

1           **THE COURT:** -- and committed a felony? You'd still be  
2 in the AFS system.

3           **MR. BRADY:** He would be in the AFS system, but I don't  
4 know if he would be in the prohibited person system.

5           **THE COURT:** Okay. But none of -- none of this -- none  
6 of this is ever going to show that, whether or not he committed  
7 a felony in Alabama -- right? -- because it's not a national  
8 system that we're looking at.

9           **MR. BRADY:** Correct, which is why -- I don't know. To  
10 be clear, I don't know about the --

11           **THE COURT:** We're going to find out somehow.

12           **MR. BRADY:** The back -- the full-scale -- just to be  
13 clear, on the full -- I -- Your Honor is correct on the -- on  
14 the initial -- the instant background check, the one-dollar  
15 one, we'll call it, that one -- I believe they would not be  
16 able to get information on a person out of state.

17           That is why I believe the State is requiring  
18 non-California residents to acquire a Certificate of  
19 Eligibility to be able to acquire ammunition in California,  
20 which is a whole other, you know, problem to force.

21           So say somebody wants to come to Imperial Valley on  
22 September 1st next week for the dove opener --

23           **THE COURT:** Yeah.

24           **MR. BRADY:** -- and they didn't realize that California  
25 requires non-lead shot in order to hunt, and they brought all

1 their lead shot. So they say, "Uh-oh. I need to go get, you  
2 know, non-lead shot at Turner's or wherever."

3 And they say, "Well, you had to bring your Certificate of  
4 Eligibility," which, keep in mind, Your Honor, it's a process  
5 of about a month to apply for a Certificate of Eligibility, for  
6 them to run the back -- to run the fingerprints, run the  
7 background check, get you your certificate.

8 **THE COURT:** Well, let me -- let me interrupt you for  
9 just a second. I'll take this over and ask Mr. Richards.

10 So tell me what a Certificate of Eligibility -- how is  
11 that obtained?

12 **MR. RICHARDS:** There's an application process with the  
13 Bureau of Firearms. I believe that the plaintiffs --

14 **THE COURT:** Bureau of Firearms is a state agency;  
15 right?

16 **MR. RICHARDS:** Yes. It's a bureau within the  
17 California Department of Justice.

18 **THE COURT:** Okay. We all know there's federal and  
19 state laws, and somehow -- sometimes they -- they seem to  
20 conflict with each other, and sometimes they don't, but  
21 anyway -- so okay.

22 So then what? So --

23 **MR. RICHARDS:** There's an application process that's  
24 submitted to the Bureau of Fire -- an application that's  
25 submitted to the Bureau of Firearms. I'm going to say the

1 plaintiffs, I believe, submitted a description of that process  
2 with their moving papers.

3 **THE COURT:** Yeah. Yeah. If you think I remember  
4 everything, I don't. I don't even remember what I had for  
5 breakfast. So --

6 (Laughter)

7 **MR. RICHARDS:** I understand. Given the volume of  
8 documents submitted in this case, there's quite a bit of  
9 information.

10 But the Certificate of Eligibility process entails a full  
11 background check. I believe that is an NCIS check and a check  
12 of the state databases. So --

13 **THE COURT:** I thought you couldn't do an NCIS check  
14 for ammunition.

15 **MR. BRADY:** Of -- a Certificate of Eligibility is not  
16 necessarily for ammunition. It is for eligibility for firearm  
17 possession generally.

18 So the feds would -- do recognize that. There's a federal  
19 regulation that allows, for example, COE's and CCW's, which  
20 then raises another issue that I don't think plaintiffs  
21 necessarily want to pick this fight here due to all the other  
22 little skirmishes we're having in this big battle.

23 But it's unclear whether, because a Certificate of  
24 Eligibility is for firearms generally that the feds  
25 recognize -- that it even can be used for ammunition. But like

1 I said, plaintiffs are not --

2 **THE COURT:** Well, I guess we would know if they had  
3 and -- I mean, if it's been done.

4 **MR. BRADY:** Well, it's post -- once the feds allow the  
5 background check for the COE, it's out of their hands as to how  
6 California -- what California recognizes the COE for. So I  
7 think they would be okay. I'm just saying it's a question.

8 **THE COURT:** Okay. All right. So -- so you can get a  
9 COE if -- if you are from out of state, you come into  
10 California, like Mr. Brady just pointed out -- you come in,  
11 you're going to go hunt doves in Imperial Valley on  
12 September 1st, but then you find out that you have to use steel  
13 shot or copper shot. You go down to Big 5 or Imperial  
14 Hardware, and you say, "I want to buy some" -- "some ammo."

15 And they say, "Well, you've got to go through this COE  
16 process."

17 And how long does that take, Mr. Richards?

18 **MR. RICHARDS:** I believe Mr. Brady was correct when he  
19 described it as approximately a month. It would probably take  
20 a little more, a little less, depending on the person.

21 **THE COURT:** So a poor guy from Arizona -- or gal from  
22 Arizona -- who came -- go hunting in Imperial Valley on  
23 September 1st has to sit there and watch his or her buddies  
24 annihilate the doves, and he or she gets to sit there and --

25 **MR. RICHARDS:** In that -- in that scenario, that's



1 probably the most likely outcome. There may be some potential  
2 workarounds, but I think that's probably the most likely  
3 outcome.

4 **THE COURT:** That you know of unless -- unless --  
5 unless they want to violate the law and they get their buddy to  
6 go buy the ammunition and the buddy gives it to them. Then  
7 they -- and then they use it, but then they'd be violating the  
8 law, wouldn't they?

9 **MR. RICHARDS:** Not necessarily, no, Your Honor.

10 **THE COURT:** No?

11 **MR. RICHARDS:** To be a licensed ammunition vendor, you  
12 have to sell more than 500 rounds per year. So that may be  
13 a -- that may be one potential workaround.

14 **THE COURT:** Wait. Let me see -- let me see if I  
15 understand.

16 See, I -- you know, the last one of these cases I had  
17 is -- which you probably know. It's no secret. I think I  
18 asked -- I think it was Mr. Echeverria -- where I mentioned to  
19 him, "I think nowadays, if you want to have anything to do with  
20 firearms, you have to have a lawyer on retainer." You have to  
21 have this lawyer that follows you around wherever you go.

22 So are you saying to me that if -- that if I'm the Arizona  
23 hunter and I'm going to go hunt and I can't buy the ammunition,  
24 I can get my buddy over here, Bob, to -- to buy the ammunition,  
25 and then he can give me the ammunition, and that's perfectly

1 legal?

2 **MR. RICHARDS:** Potentially, yes, but --

3 **THE COURT:** Potentially? Wait, wait, wait.

4 Potentially, but, look, I don't want to go to prison or jail  
5 because of "potentially." You represent the State.

6 So is it or is it not legal?

7 **MR. RICHARDS:** Well, Your Honor is speaking in  
8 hypotheticals here. I think if you read the statute, it  
9 appears that that would be permissible. I don't see --

10 **THE COURT:** Okay.

11 **MR. RICHARDS:** -- a reason why it wouldn't be, but I'd  
12 also like to clarify because I believe a similar hypothetical  
13 came up at the motion to dismiss hearing in this case.

14 **THE COURT:** Okay.

15 **MR. RICHARDS:** And there -- this is a certain -- if  
16 someone is going to come to California to go dove-hunting, they  
17 do have an obligation to review the rules of the state and make  
18 sure that they -- that they bring the -- you know, the  
19 ammunition or firearms that are compliant with state law.

20 **THE COURT:** Okay. Okay. What about this? Look, I  
21 used to hunt, haven't in many, many years, but I used to hunt.  
22 Some days I was a really good shot, and some days I was a lousy  
23 shot, and so some days I used up all my ammunition.

24 So I come from Arizona. I've got my five boxes of seven  
25 and a half shells, and, man, I haven't hit a thing. I need

1 some more.

2 Now it's not such an odd hypothetical, is it? It's a real  
3 hypothetical. It's something that happens quite often.

4 **MR. RICHARDS:** I believe this is actually the inverse  
5 of the hypothetical that Your Honor posed at the motion to  
6 dismiss hearing, which is where a California resident leaves  
7 the state, bringing in ammunition to go hunting in Arizona.

8 But in any event, I think the answer is quite similar, and  
9 that is that if you're going to come to California to hunt,  
10 that you should plan accordingly. That would include planning  
11 for the somewhat foreseeable situation that you just mentioned  
12 where you may require more ammunition than you do on an average  
13 day.

14 **THE COURT:** Bring a case. Well --

15 **MR. RICHARDS:** Whatever it takes.

16 **THE COURT:** -- let me ask you this, though, because,  
17 see, this is all -- I mean, I don't think -- I don't think --  
18 what was those charts we used to be able to buy when we were in  
19 law school? We were trying to figure out -- for example, in  
20 real property, they had these huge charts.

21 **MR. BRADY:** Flow charts?

22 **THE COURT:** Yeah. It's a flow chart, but they had a  
23 particular name. Anyway, you need one of these for California  
24 and federal gun laws.

25 Okay. So -- so -- so it's true. So what you just told me

1 is this. So I'm the Arizona hunter. I come to the --  
2 California. I run out of ammunition or didn't buy it. I can  
3 go to my buddy, and I can say, "Hey, go buy me a box of, you  
4 know, seven and a half ammo." I'm not violating the law, and  
5 he's not violating -- violating the law if he gives it to me.

6 As I understand the purpose of this law, it is to keep  
7 prohibited people from getting their hands on ammunition,  
8 which -- hey, I'm on board with that. I mean, I -- you know,  
9 but what's to stop, you know, the Gilroy young man; right?  
10 Same situation. He can come to -- he can come to California  
11 with his AK-47, and he can get his buddy to get the ammunition  
12 for him; right?

13 We've accomplished absolutely nothing; right? He still  
14 got his hands on the ammunition. Neither one of them broke the  
15 law.

16 **MR. RICHARDS:** Yes. And, Your Honor, I think that  
17 there's two answers to that question.

18 The first is I think it's important to recognize that  
19 firearms violence and firearms crime is an extraordinarily  
20 complex problem and that we can't expect any one law to solve  
21 all potential iterations of that problem.

22 **THE COURT:** Well, you could. Just ban all firearms  
23 and all ammunition.

24 **MR. RICHARDS:** Well, that law would be  
25 unconstitutional, Your Honor --

1           **THE COURT:** Yes, it will.

2           **MR. RICHARDS:** -- and I don't think that that -- so it  
3 would be no law at all.

4           But the -- but the -- but the other point here is that  
5 the -- when the friend or straw purchaser goes out and  
6 purchases the ammunition -- this gets to a point that the  
7 plaintiffs raised in their brief. They contend -- they  
8 complain that there's no reason for the record requirement, of  
9 maintaining records of these sales.

10          The -- law enforcement would then have a record to  
11 understand how that shooter got the ammunition. They'd be able  
12 to potentially work backwards and see that a friend purchased  
13 it for him or --

14          **THE COURT:** But what does that accomplish?

15          **MR. RICHARDS:** Well, if it were a situation that he  
16 were a prohibited person, for example, then the friend would be  
17 a straw purchaser and have committed a crime. And so that  
18 would help law enforcement solve crime, just to give one  
19 example.

20          So to use a different example -- and this came up in the  
21 record where we learned from the New Jersey experience that --  
22 that the gang members would often go and do straw purchasing  
23 for other gang members. And if you had records of that, that  
24 person could then be tried and convicted for or charged with --  
25 with being a straw purchaser in violation of state and federal

1 law.

2 So there are -- there are values to all of this, and I  
3 don't think that we can expect that any one of these laws is  
4 really going to solve all of these problems, and I don't think  
5 anyone is contending that they will. They would just help  
6 alleviate those problems to the best that the State is able to  
7 do.

8 And that's why -- we're getting a little ahead of  
9 ourselves, but we need to give some deference to the predictive  
10 judgments of lawmakers in this context about what effects these  
11 laws are going to have. I think --

12 **THE COURT:** You know -- I'm not trying to cut you out,  
13 but Mr. Richards raises an interesting point.

14 I recently read, for example, that in the predictive  
15 judgments of the legislature, somebody has come up with the  
16 idea that an AR-15 can fire 300 to 500 rounds a minute. That  
17 has never been challenged to the best as I can tell. It's  
18 never been -- nobody has been cross-examined on that. Nobody  
19 has ever tested it. I will eat my robe if you can take an  
20 AR-15 and fire 300 to 500 rounds a minute.

21 So the problem with the predictive judgment of the  
22 legislature is that -- think about this. If I'm driving down  
23 the road and the speed limit is 65 but I decide I want to go  
24 75 miles an hour, I get a speeding ticket. Now, what's going  
25 to happen? If -- if I'm guilty, I'm going to pay a fine;

1 right? I can't go to prison. I can't go to jail; right? I'm  
2 going to pay a fine.

3 Now, before the State can affect my driving privilege --  
4 because we all agree that a driver's license is a privilege;  
5 right? It's not a right. I think we agree on that; right?

6 **MR. RICHARDS:** Yes.

7 **THE COURT:** Okay. Now, before the State can affect my  
8 driving privilege and fine me for speeding, here's what has to  
9 happen:

10 There has to be a hearing. At that hearing, there has to  
11 be due process. At the due process stage, the Government --  
12 the Government has the burden of proof. So the Government has  
13 to prove that I was speeding. They have to do that  
14 consistently with a rule -- the rules of evidence, which we  
15 have established in order to make sure that we have relatively  
16 reliable information before the trier of fact; right?

17 And I, as the person who's been charged, have the right to  
18 confront and cross-examine witnesses and to call witnesses on  
19 my own behalf. That's all the things that have to happen in  
20 order for my driving privilege to be affected and to be fined.

21 Now, how is it -- how is it that the State can actually  
22 argue that the State can deprive millions of people of -- at  
23 least allegedly -- a constitutional right by simply having  
24 legislators say, "Well, we're making a predictive judgment that  
25 this is what we need"?

1 Do you see the difference? There's, like, this huge world  
2 of difference. You're telling people, "Yeah, you may have this  
3 constitutional right, but we don't care because we're the  
4 legislature, and we have the power to do whatever we want to  
5 do, and you must" -- "you, the Court, must" -- "must follow our  
6 predictive judgment."

7 There's something odd about that, don't you think?

8 **MR. RICHARDS:** No, Your Honor, not necessarily. I  
9 would disagree.

10 **THE COURT:** Okay.

11 **MR. RICHARDS:** And I think there's a short answer to  
12 that, and it is that this is the framework that the courts have  
13 set up to respect separation of powers and respective roles of  
14 the different departments of government, and that's  
15 longstanding both -- well, not as longstanding within the  
16 Second Amendment context --

17 **THE COURT:** Look --

18 **MR. RICHARDS:** -- because that's relatively recent.

19 **THE COURT:** -- if the State of California tomorrow  
20 said, "We're going to require people who show up at the polling  
21 place to have a" -- "to go through all of these processes, you  
22 know, get a Certificate of Eligibility, have a real ID, have a  
23 passport, et cetera, because we think that the right to vote is  
24 important. And when one person casts a vote that they  
25 shouldn't be allowed to cast, it negates somebody else's



1 vote" -- right?

2 Would -- do you think that would pass muster? I mean, how  
3 long do you think it would take the Ninth Circuit to reverse a  
4 ruling upholding that kind of a statute?

5 **MR. RICHARDS:** Your Honor, I have no way of knowing,  
6 and -- I mean, that's -- that's a hypothetical that comes from  
7 a very different body of law with a much different background,  
8 I mean, compared --

9 **THE COURT:** But it's the same principle. The  
10 principle is we have rights; right? We have certain rights.  
11 They are delineated in something called a Bill of Rights. They  
12 were -- they were put into the Constitution for a reason. They  
13 were put into the Constitution to make sure that the  
14 majority -- a majority was not able to oppress the minority  
15 with regards to these issues.

16 It's the same issue, though, isn't it? It's the same  
17 principle.

18 **MR. RICHARDS:** I don't think it can be reduced that --  
19 that narrowly, Your Honor. Different rights have different  
20 backgrounds. And, again, I think using voting as an example  
21 and documents required for voting -- you can look at the  
22 history of this country and see that it's quite different than  
23 the history of firearms in this country.

24 And I think cases like *Glucksberg* from the Supreme Court  
25 cases that examined fundamental rights under the substantive

1 due process clause make clear that history does play a role  
2 in -- in defining and establishing rights.

3 So I think that it's -- it risks being reductionist to  
4 compare rights at that level, saying, "Well, one right and  
5 another right should be treated the exact same way." We see  
6 this even in the First Amendment context where we have  
7 different doctrines to examine different issues that come up  
8 within the First Amendment.

9 Just to give one example, commercial street speeches is  
10 treated differently than political speech.

11 **THE COURT:** Well, I was going to mention that perhaps  
12 because you know, if you noticed, that the Gilroy shooter was  
13 19. The Dayton shooter was under 25. I think he was 23. The  
14 El Paso shooter, I believe, also was under 25.

15 Now, I've read lots and lots of reports. As you can tell,  
16 I'm interested in the subject matter. The number of shootings  
17 that have occurred in the last few years, an overwhelming  
18 number of them, are occurring by -- by people that are under  
19 25. And there are studies that seem to indicate that social  
20 media has a big impact on how people are radicalized, how  
21 people are moved, bullied, moved to do these acts.

22 So I suppose that in the interest of protecting the  
23 public, then we could enact a law that says that people under  
24 25 are not allowed to use the Internet or social media. How  
25 long do you think that would withstand before the Ninth Circuit

1 or the Supreme Court said, "That ain't going to happen"?

2 **MR. RICHARDS:** Again, Your Honor, I think it's similar  
3 to the voting example, different -- different history,  
4 different case law, different -- different rights. It's hard  
5 to make these kind of comparisons at such a broad -- a broad  
6 level.

7 And we're bouncing all over the place here a little bit,  
8 but this does get to the issue of the problem with facial  
9 challenges generally, which is why they accepted and regarded  
10 that courts aren't in a great position to make the kinds of  
11 decisions and distinctions that you're talking about. That's  
12 why there's --

13 **THE COURT:** But if we don't do it, who will?

14 **MR. RICHARDS:** Well, the legislature. That's the --  
15 that's the role of the legislative department, and the Court  
16 certainly can check that. But the preferred method is for them  
17 to do that in as-applied challenges, and that -- and that comes  
18 up again and again.

19 And I think the language from the Supreme's -- the Supreme  
20 Court's case in *Washington Grange* that the parties cited in  
21 their brief is relevant here. Justice Thomas writing for the  
22 majority -- and I'll just -- it's a fairly long quote, but I  
23 think it repeats --

24 **THE COURT:** That's okay, but give me the cite on it  
25 just to --

1           **MR. RICHARDS:** Sure.

2           It's 522 U.S. at 540, and this is --

3           **THE COURT:** Okay.

4           **MR. RICHARDS:** This is, you know, Justice Thomas  
5 writing for the majority of the Court. He says facial  
6 challenges are disfavored for several reasons. Claims of  
7 facial validity often rest on speculation. As a consequence,  
8 the risk -- they raise the risk of premature interpretation of  
9 statutes on the basis of factually bare-bones records.

10          Facial challenges also run contrary to the fundamental  
11 principle of judicial restraint. The Court should neither  
12 anticipate a question of constitutional law in advance of the  
13 necessity of deciding it nor formulate a rule of constitutional  
14 law broader than is required by the precise facts to which it  
15 is to be applied.

16          Finally, facial challenges threaten to short-circuit the  
17 democratic process by preventing laws embodying the will of the  
18 people from being implemented in a manner consistent with the  
19 Constitution.

20          And that's the end of that quote, and I think that -- that  
21 highlights a lot of the issues that we're talking about now,  
22 some of the problems with that. Speaking in the abstracts,  
23 speaking in generalities, not working with concrete evidence is  
24 a big problem. That's why courts are hesitant to do that,  
25 including the Supreme Court.

1           **THE COURT:** But if we don't have the evidence, the  
2 legislature doesn't have the evidence. I mean, they have -- I  
3 told you I just read about somebody saying that an AR-15 could  
4 fire 300 to 500 rounds a minute.

5           It can actually. It can maybe. Well, I shouldn't say  
6 "can." It might be able to under very, very limited  
7 circumstances with a nonhuman pulling the trigger, but a human  
8 can't do it. But yeah, here, the legislature advised that as  
9 if, in fact, it were gospel, and it's -- it's not gospel.

10          So if tomorrow -- if tomorrow -- I don't see very well,  
11 but I think you have a -- I think you have a beard. If  
12 tomorrow the legislature said that, you know, bearded --  
13 bearded men are -- are -- suffer from toxic masculinity; and  
14 therefore, they should not be allowed to vote, and we find this  
15 to be in the interest of the public -- right?

16          I mean, you think -- you think a court is going to sit  
17 still for that and allow that to go forward? Of course not  
18 because that's our -- that's our job. I mean, that -- we took  
19 it on in *Marbury v. Madison*. We said, "Hey, this is our job  
20 to" -- you know, I don't want to go -- I don't want to go  
21 there. So I think there's those issues.

22          Anyway, we got off on a rabbit trail, but there's so much.  
23 I mean, there's so much. You know, this isn't just -- we're  
24 not talking about a public policy issue. This isn't a case  
25 about a public policy, whether or not the State has decided

1 that somebody has to wear a blue shirt on Fridays or somebody  
2 has to, you know, not eat meat on Friday or whatever.

3 I mean, this is a -- these are significant issues. I'm  
4 willing to spend the time, and I want to explore all my  
5 questions, even if we do get off topic from time to time. We  
6 may have to go on into the afternoon or -- anyway, I  
7 interrupted you, and I'm so sorry, but you were --

8 **MR. BRADY:** No.

9 **THE COURT:** You were making your pitch.

10 So go ahead.

11 **MR. BRADY:** No need to apologize, Your Honor, because  
12 I think that there was some interesting territory explored  
13 there between you and Mr. Richards, and I think it's critical  
14 to understand that the legislature made no findings here. They  
15 made no predictive judgments.

16 This is a proposition that created this law. People who  
17 have no idea of what the findings were based on just assumed  
18 that the findings that were laid out in the proposition were  
19 accurate and never got to examine the evidence, as Your Honor  
20 just suggested, that the legislature rarely even does, but the  
21 citizens of California certainly did not.

22 **THE COURT:** Is the motivation -- since this was a --  
23 since this was a -- an initiative, is the motivation of the  
24 person or persons who are proposing the initiative -- is  
25 that -- is that -- is that an issue?

1 Can that -- can that -- suppose, for example -- and I  
2 don't remember who was the proponent of this initiative, but  
3 suppose that it was someone who was really trying to find a way  
4 around the Second Amendment, trying to find a way to keep  
5 people from getting guns and getting ammunition.

6 Is that something that's discoverable, that's -- I mean,  
7 we can look to and say, "Okay. This is the motivation behind  
8 the proponent of the initiative"?

9 **MR. BRADY:** Potentially.

10 Just to be clear, the proponent was now-Governor Newsom,  
11 then-Lieutenant-Governor Newsom, and his open hostility towards  
12 the Second Amendment and desire to curtail it is not hidden by  
13 any means. He frankly expresses it. Whether that is -- can be  
14 considered by this Court, to be frank, Your Honor, I don't know  
15 in this specific context.

16 I do know that there's recent case law in the First  
17 Amendment context with respect to retaliation for speech that  
18 the Government can -- or I'm sorry -- that the Court can  
19 consider the Government's --

20 **THE COURT:** Wasn't that one of the issues in the  
21 Supreme Court case having to do with the citizens --  
22 citizenship question on the census, was the motivation behind  
23 putting the question on the census?

24 **MR. BRADY:** That is correct, Your Honor, and that's  
25 why -- I don't know the scope of this, but because I think that

1 it would be frankly -- and I know I'm not helping myself, but I  
2 just want to be, you know, up front with the Court here. I  
3 don't know the scope of when it is appropriate for the Court to  
4 take in -- to consider motivations.

5 For example, if a particular legislator or members -- and  
6 I think it is different when you're talking about a legislature  
7 or voters versus by a single individual making a regulation  
8 because then it was their decision versus a legislature having,  
9 you know, a hundred people having to vote on it. They may not  
10 have had the same motivations.

11 So I think in that sense, you would look not to the  
12 motivation but to, you know, whether this is appropriate or  
13 not. In other words, yeah, they may want to curtail Second  
14 Amendment rights, but if they do it in a way that's  
15 constitutional, then I don't know if plaintiffs would be able  
16 to, you know, make any hay with that argument.

17 **THE COURT:** That makes sense. That makes sense.

18 **MR. BRADY:** I don't even necessarily know we need to  
19 go there because, again, this was by proposition. So -- and so  
20 the legislator -- the legislature's -- no deference to the  
21 legislature even if, you know, Mr. Richards' recitement of the  
22 case law was correct, but it's not.

23 Where the courts owe this -- the legislature deference on  
24 their predictive judgments is on whether the legislature --  
25 whether the Government has an interest, not on whether it is



1 sufficiently tailored to further that interest.

2           **THE COURT:** I think there's no question that the  
3 Government has an interest in -- in protecting the public;  
4 right?

5           **MR. BRADY:** Correct. Nobody is disputing that nor --  
6 nor are we -- are plaintiffs even disputing that, more  
7 specifically, they have an interest in keeping arms out of the  
8 hands of dangerous people.

9           The question is a fit one, and that -- on that question,  
10 the State is entitled to zero deference under, you know, *Turner*  
11 case law, which is all cited in plaintiffs' brief. And this  
12 has been, you know, batted around, a lot of this briefing that  
13 "Oh, we just relied on the predictive judgments of the  
14 legislature."

15           But that is not with respect to whether there is a  
16 sufficient fit here, and there clearly is not a fit when you're  
17 talking about 11 -- almost 11,000 people in a single month  
18 being denied their right.

19           And, again, the State will say, "Well, we believe that  
20 that's only temporary, and that may be a simple fix," and they  
21 give examples, but it's their burden. It is the State's burden  
22 to show why -- specifically explain how those people will be  
23 able to easily remedy their situation. They have not done  
24 that.

25           We don't -- we do not believe that that easy fix exists.

1 Nothing is ever easy to fix at the California Department of  
2 Justice Bureau of Firearms with respect to these records.  
3 There's evidence in the record that suggests, you know, it  
4 takes months to do anything, including a Certificate of  
5 Eligibility.

6 So would months -- would it be okay for somebody who just  
7 wants to acquire ammunition -- let's assume that it's just  
8 this, you know, AFS records check that is the problem. The  
9 California Department of Justice Bureau of Firearms is going to  
10 help 11,000 people fix that problem quickly in one month?

11 And that's -- that's just their system problem.

12 **THE COURT:** Well, what's the alternative?

13 **MR. BRADY:** Like -- as I said before, Your Honor, we  
14 explored it a little bit. And to be frank, you know, it's not  
15 plaintiffs' burden to propose alternatives.

16 **THE COURT:** Of course not. No, it's not.

17 **MR. BRADY:** No. Exactly.

18 And so I don't know. I suggest -- I don't know if the  
19 State necessarily needs to rely on the AFS, and I think it's  
20 crucial to understand the -- the macro context here in that  
21 California is not obligated to have any specific background  
22 check system. They're the only state in the nation that has  
23 this -- that has any background check system for ammunition.

24 And so nobody is compelling them to say, "Oh, you have to  
25 use the AFS record or, you know, check the AFS record," or

1 nobody is compelling them to say, "Oh, well, you can't use the  
2 Federal Limits Apply ID's. You have to use this additional  
3 supplemented documentation."

4 So it's their decision to -- to make these burdens and  
5 these hurdles higher on plaintiffs and ammunition purchasers  
6 generally.

7 **THE COURT:** Let me -- let me interrupt you, and I hope  
8 you figured out by now that as questions come up, I explore  
9 them rather than just simply allow you to -- to tell me what  
10 you want me to hear.

11 So -- so as I understand it, with regards to the  
12 identification issue, California has three types of driver's  
13 licenses. They have a real ID driver's license, they have a  
14 citizen or a legal immigrant driver's license, and then they  
15 have a legal alien driver's license, but you can only use the  
16 real ID driver's license in order to buy ammunition.

17 Is that my understanding of the statute?

18 **MR. BRADY:** If you're only -- well, it's not the  
19 statute. It's the California Department of Justice Bureau of  
20 Firearms' regulation. The statute does not require this. This  
21 is why I say they made this decision to put this extra burden.  
22 But without the real ID, if you have a Cal- -- a California  
23 real ID that meets the federal requirements, then you do not  
24 need any other documentation.

25 If you have a Federal Limits Apply ID, which is currently

1 the standard issue by California -- if you go into the DMV and  
2 request an ID and don't say anything specific, they will issue  
3 you a Federal Limits Apply ID. You would not be able to  
4 acquire ammunition with that ID alone.

5 You would have to bring supplemental documentation,  
6 including a passport or a birth certificate. And, again, the  
7 State, you know, challenges, "Well, how hard is it to go back  
8 home and get your passport or your birth certificate?"

9 **THE COURT:** What if you don't have a passport?

10 **MR. BRADY:** What if you don't have it, and what if you  
11 don't want one? And these -- and plaintiffs lay out in detail  
12 the time and money it takes to get a passport or to get a birth  
13 certificate. These are -- you know, this sometimes means  
14 taking time off work on a weekday because your -- you know, the  
15 Government is generally closed on the weekend.

16 Going and spending, I think, for a passport -- I didn't do  
17 the math, but it was about 200ish dollars and, you know, time  
18 off work to go get that passport. And then if you want it  
19 expedited, you know, then we're talking about waiting weeks,  
20 weeks, months unless you want to spend the extra \$60 for an  
21 expedited.

22 This is all just so you can, you know, get a box of  
23 ammunition.

24 **THE COURT:** A box of .22-round soft nose --

25 **MR. BRADY:** Yeah, a 5 -- 5-dollar box of .22's.

1           **THE COURT:** I don't think you can buy a box of .22's  
2 for five bucks anymore. Those days are long gone.

3           Mr. Richards -- so let me ask you a question. So -- so  
4 why the requirement for this real ID license?

5           **MR. RICHARDS:** Well, the requirement for the real ID  
6 license is to ensure that when people are purchasing ammunition  
7 that they have a lawful presence in the United States and  
8 therefore aren't a prohibited person under federal law.

9           The -- the history here is somewhat long and set forth, I  
10 think, fairly well by the parties in their pleadings, in -- or  
11 the moving papers and supporting materials, and I'm happy to go  
12 over it right now.

13           **THE COURT:** Yeah. Do it -- do it for me.

14           **MR. RICHARDS:** Okay. So starting in 2015, California  
15 started issuing what are called AB60 licenses. Those are  
16 licenses that the State would issue to people who cannot  
17 establish lawful presence in the United States. Those -- those  
18 licenses contained a notation on them that said, "Federal  
19 Limits Apply."

20           **THE COURT:** And what's the purpose of that notation?  
21 To indicate that it's not a federal real ID?

22           **MR. RICHARDS:** That the identification can't be used  
23 for certain purposes, you know, I think, such as establishing  
24 right to work, for example. I think there's several more  
25 purposes that are outlined in the State's finding of emergency

1 on this for the regulation.

2 And so at that point, you can tell from looking at a  
3 driver's license that said, "Federal Limits Apply" that the  
4 person wasn't lawful -- lawfully present in the United States  
5 and therefore would be prohibited.

6 However, in 2016 -- I'm sorry. In 2018, in connection  
7 with the State's implementation of the Federal Real ID Act,  
8 which is a federal law that required certain requirement --  
9 states to impose certain requirements for obtaining ID that  
10 could then be used to do things like board airplanes and enter  
11 secured facilities -- it's now starting in 2020.

12 But when the State was implementing that requirement, it  
13 chose to issue the Federal Limits Apply, the license, as a  
14 default as to anyone who doesn't want to go through the process  
15 of getting a -- a real ID.

16 And so from 2016 forward, you can't tell from a Federal  
17 Limits Apply ID that the person is not lawfully present in the  
18 United States. They might be. They might not be. And that's  
19 the genesis of the regulation, again, as set forth in the  
20 finding for emergency.

21 **THE COURT:** So -- so -- so what happened was that the  
22 State decided that it would issue driver's licenses to people  
23 who were unlawfully present in the state; right?

24 **MR. RICHARDS:** Yeah.

25 **THE COURT:** Okay.

1           **MR. RICHARDS:** Yes.

2           **THE COURT:** And when they did that, you and I -- well,  
3 I don't know about you, but I know about me. I'm legally  
4 present in the state.

5           So if -- as you know, we do a lot of reentry cases in the  
6 Southern District of California. And if, you know, Jose or  
7 Francisco or Pedro or whoever over there goes and applies to  
8 DMV for a driver's license, they get a driver's license.

9           And if we were to be pulled over by a Highway Patrolman,  
10 my license would look exactly the same as his license unless I  
11 had gotten a real ID license; right?

12           **MR. RICHARDS:** If your license had been issued after  
13 January 2016, yes.

14           **THE COURT:** Okay.

15           **MR. RICHARDS:** If your license had been --

16           **THE COURT:** Yeah. Go ahead.

17           **MR. RICHARDS:** If your license had been issued before  
18 that, then they would be -- there would be a difference. It  
19 wouldn't have the notation.

20           **THE COURT:** Well, they wouldn't have a license; right?  
21 Because the State wasn't issuing licenses to --

22           **MR. RICHARDS:** I was speaking about -- sorry,  
23 Your Honor -- in the example Your Honor gave about Your Honor.

24           **THE COURT:** Right.

25           **MR. RICHARDS:** If your driver's license were issued

1 before 2016, there's no notation on it. It's just a plain  
2 driver's license that doesn't have any -- any sort of federal  
3 limits ID or -- I think it's a bear in the corner. You can see  
4 the pictures in the record --

5 **THE COURT:** Okay.

6 **MR. RICHARDS:** -- but -- so that license would be  
7 different from the -- the AB60 license that the -- that the  
8 person who had entered the country illegally was able to get  
9 or -- or from a license issued after January 2016.

10 **THE COURT:** So my license was issued after  
11 January 2018, my renewal, and I looked at it, and it says,  
12 "Federal Limits Apply." So, again, my license would look just  
13 the same as Jose or Francisco or Pedro's or whoever; right?

14 **MR. RICHARDS:** That's correct.

15 **THE COURT:** And so the real ID requirement is intended  
16 to solve the problem created by the fact that the State decided  
17 to issue driver's licenses to -- to people who are unlawfully  
18 present in the United -- in the United States; right? Because  
19 otherwise, you'd just simply present your driver's license, and  
20 that would be good enough; right?

21 **MR. RICHARDS:** That's one way of looking at it,  
22 Your Honor, but I think it's also important to note that if  
23 that had been the process and the State implemented the federal  
24 real ID law, which it must, you would have had to provide all  
25 the supporting documentation that you would now need when you



1 use your Federal Limits Apply ID to purchase ammunition.

2 That is, you have to go in and bring in your Social  
3 Security card or passport and a couple other documents to get  
4 your federal real ID, which I myself did just two weeks ago.  
5 So this is in --

6 **THE COURT:** How long did you stand and wait at the DMV  
7 office? No, never mind.

8 (Laughter)

9 **MR. RICHARDS:** You won't believe this. It was only 20  
10 minutes.

11 **THE COURT:** Would you go with me the next time because  
12 I'll tell you what. That wasn't my experience when I tried to  
13 get a plain old driver's license.

14 (Laughter)

15 **MR. RICHARDS:** I understand it could take longer.  
16 And, you know, not to make myself a focal point here, but I  
17 think that when Mr. Brady talks about some of the burdens  
18 here -- I mean, you know, I found myself in a similar position.  
19 I had moved around the country several times over the last  
20 several years, and during those many moves, I lost my Social  
21 Security card.

22 So this process for me to get the federal real ID did take  
23 some time, but it was not unduly burdensome on me. I mean, I  
24 had to go to the Social Security Administration, get a new  
25 Social Security card, and then I had to collect my paperwork

1 and go to the DMV. And this is a process that's akin to any  
2 number of other things that grownups have to do in everyday  
3 life.

4 And so, you know, I understand that -- the frustration of  
5 having to wait in the DMV is something that's at the forefront  
6 of people's minds. This is a normal -- a normal process, and  
7 it's one that, by the way -- if the State hadn't made the  
8 choice to issue Federal Limits Apply ID's, then everyone would  
9 have to go through it anyway to get this federally compliant  
10 law.

11 So to take another example, in a state that doesn't do  
12 what California's doing, to get an ID in those states, you're  
13 going to have to go through this process of getting a federal  
14 real ID anyway. It's not -- it's not that --

15 **THE COURT:** But aren't there a lot of people who've  
16 had their driver's licenses since before 2018?

17 **MR. RICHARDS:** Do you mean before 2016?

18 **THE COURT:** Yeah.

19 **MR. RICHARDS:** Yeah, and those ID's will work. You  
20 can purchase that -- you don't need anything beyond that ID.

21 **THE COURT:** I see.

22 So if you have a driver's license that was issued before  
23 the FLA requirement came into being, you can use that -- that  
24 ID?

25 **MR. RICHARDS:** That's -- that's correct. And --

1           **THE COURT:** Okay.

2           **MR. RICHARDS:** -- again, I've been touching on this a  
3 lot today, Your Honor, but this is the problem with the facial  
4 challenge.

5           Plaintiffs produced no evidence, made no suggestions that  
6 this is any appreciable number of people, what number of people  
7 this is, what the nature of the burden on these people is  
8 beyond the description of the wait. And most importantly, no  
9 plaintiff in this case has actually said that they have a  
10 federal limits ID and decide to do any of this stuff.

11           So this is -- this is mingling both standing issues and  
12 facial constitutional problems that really pose a threshold --  
13 a threshold problem for their request here today, and that's a  
14 very big problem, Your Honor. And like I said, I'm probably  
15 going to be returning to it at several points in our talk.

16           **THE COURT:** That's fine. I'm not going to stop you  
17 from it. I promise.

18           All right. Go ahead.

19           **MR. BRADY:** So I think it's crucial to understand that  
20 the Federal Limits Apply ID -- the only thing for which it does  
21 not work in this state under state law, not under federal  
22 law -- there are federal restrictions, hence the "Federal  
23 Limits Apply."

24           The only thing the State of California will not accept a  
25 Federal Limits Apply ID for is for firearm and

1 ammunition-related acquisition, and --

2           **THE COURT:** And that's because it could be possessed  
3 by someone who's unlawfully present --

4           **MR. BRADY:** Correct.

5           **THE COURT:** -- in the United States --

6           **MR. BRADY:** But --

7           **THE COURT:** -- or someone who is lawfully present in  
8 the United States?

9           **MR. BRADY:** It is to -- it is to attempt to make sure  
10 that a person who is -- is acquiring a firearm or ammunition  
11 has lawful presence in the United States, but --

12           **THE COURT:** Which is -- which is federal law and which  
13 is a great idea.

14           **MR. BRADY:** Correct.

15           **THE COURT:** A great idea.

16           **MR. BRADY:** But -- sure, but the federal government  
17 recognizes California's Federal Limits Apply ID for firearm  
18 background checks.

19           So the State cannot say that this is some crucial, you  
20 know, interest to -- to require additional documentation  
21 particularly when the reason for these ID's is to protect the  
22 very people they are saying that are too dangerous.

23           **THE COURT:** Wait. So if I want to go out and buy a  
24 Glock, I can use my FLA driver's license as ID that will allow  
25 me to purchase that Glock?

1 Is that what you're saying?

2 **MR. BRADY:** You could have a few months ago before  
3 this new regulation because their new regulation about Federal  
4 Limits Apply ID's went to apply to ammunition and firearm  
5 purchases.

6 **THE COURT:** Okay.

7 **MR. BRADY:** And this is a whole other -- I don't want  
8 to --

9 **THE COURT:** I can use it -- I can use it in Arizona.

10 **MR. BRADY:** Well --

11 **THE COURT:** I can use my FLA.

12 **MR. BRADY:** If they had the equivalent. Let's just  
13 say that the FLA ID is not -- the fed- -- the federal  
14 government is not the impediment to acquiring a firearm with an  
15 FLA ID. The State of California's regulation is.

16 **THE COURT:** Okay.

17 **MR. BRADY:** So the feds will recognize that -- an FLA  
18 ID. So the State is saying, "Oh, but we need to make sure that  
19 these people are, you know, lawfully present in the country"  
20 while at the same time having these ID's to protect those  
21 people -- very people.

22 And I'm not trying to make an argument either way as to  
23 whether that's good or bad policy. I'm just talking about the  
24 hypocrisy of it and how it shows that they really don't have  
25 any interest in requiring this ID. It's simply to place

1 another burden in the way of people who are exercising their  
2 Second Amendment rights.

3 I mean, you can use that ID for everything other than  
4 exercising a constitutional right. California can't place this  
5 burden in the way of -- you know, as the gatekeeper to a  
6 constitutional right and say, "Oh, you have to show an ID. Oh,  
7 but the ID we gave you isn't sufficient. You have to go get  
8 something else" when they accept it for every other purpose and  
9 the federal government has accepted this for similar purposes.

10 It just doesn't meet the fit test. It's --

11 **THE COURT:** Is California the only -- the only state  
12 that use -- that imprints FLA on their driver's license?

13 **MR. BRADY:** To my knowledge, yes, Your Honor.

14 **THE COURT:** Okay. All right. Okay.

15 **MR. BRADY:** I guess I can address the -- the facial  
16 issues because Mr. Richards has indicated that's a big issue.

17 We're not talking about a challenge that is prospective  
18 and theoretical. That is why the plaintiffs have not brought  
19 this motion until a year and a half after filing the case,  
20 because we waited to see how this would unfold in reality, in  
21 practice. And it has been more of a burden and more of a  
22 failure than plaintiffs even theoretically anticipated.

23 And so we're not talking about -- and just because the  
24 specific individual plaintiffs have not suffered all of or most  
25 of the harms that the system has, you know, imposed on people,

1 the California Rifle and Pistol Association is an organization  
2 that represents tens of thousands of its members and its  
3 supporters who are impacted by these laws.

4 If -- if it was -- according to the State, every  
5 individual who gets denied for some reason would have to come  
6 into Your Honor's court and bring an as-applied challenge.  
7 That's not the way it works in any other constitutional context  
8 when a substantial number of people are burdened by a law, and  
9 it's un- -- it's unequivocally, undeniably the case here that a  
10 significant number of people are. 11,000 folks just last month  
11 are.

12 Then this is appropriate for a facial challenge,  
13 especially when -- you know, they're citing basically the  
14 *Salerno* standard, which is largely ignored, high -- highly  
15 debated, and, if applied, would essentially mean that no case  
16 can ever be an appropriate facial challenge because, you know,  
17 if you were to -- there's going to be somebody who's going to  
18 be prohibited from ammunition.

19 So if that person is not affected, then nobody else --  
20 then that one person makes it so that the law applies to  
21 somebody appropriately, and so a facial challenge wouldn't  
22 work. That's just not the way it works in any other context.

23 **THE COURT:** Well, the balance of power is quite  
24 different. So that one person who may possibly be affected  
25 doesn't have the resources or the money or the time that the

1 State has. The State has an unlimited budget, unlimited number  
2 of people taken to vote to defending this lawsuit; right?

3 So if every time someone is affected and they were  
4 required to come in and hire a lawyer and -- and -- and fight  
5 their case against the State -- I mean, we're not talking about  
6 a dispute between two -- you know, between mom and pop. We're  
7 talking about a dispute between an individual who's been  
8 affected versus the State with all of its power and all of its  
9 unlimited budget.

10 I think your argument is a good one, but I just wanted to  
11 telegraph that to Mr. Richards. I think I've read cases that  
12 lead me to conclude that your argument is persuasive in that  
13 regard.

14 So anyway -- all right.

15 **MR. BRADY:** So unless Your Honor has any more  
16 questions for --

17 **THE COURT:** Well, what about the commerce clause?

18 **MR. BRADY:** Oh, sure.

19 (Laughter)

20 **THE COURT:** Yeah. What about the commerce clause?

21 **MR. BRADY:** You know, for that particular issue -- I  
22 mean, the plaintiffs have made their arguments as to why this  
23 law regulates extraterritorially, and the State has not even  
24 attempted to refute that. So I think that plaintiffs are  
25 necessarily going to prevail on that aspect of our commerce



1 clause challenge.

2 But even setting that aside, I don't even think Your Honor  
3 needs to go there or we need to have that debate in too much  
4 detail because it really comes down to the fact that this law,  
5 this scheme, directly discriminates against out-of-state  
6 commerce. It's -- it's really undeniable.

7 I know the State wants to make this distinction that  
8 "Well, we're only impacting" -- that an instate vendor can't  
9 ship ammo, either, so a California company -- based company and  
10 Nevada-based company are in the same shoes because neither of  
11 them can ship directly to a California resident. But that's  
12 not the way it works.

13 The California instate vendor has the option of at least  
14 direct access to the California consumer whereas the Nevada  
15 entity is subject to the mercy of instate vendors, who will  
16 say, "No, I don't want to accept any ammunition. So you cannot  
17 access California residents" or "Oh, you want to sell  
18 ammunition to my customers? Okay. Well, I'm going to hit my  
19 customers with, you know, a 50-dollar fee for my troubles," and  
20 there's nothing precluding them from doing that.

21 Indeed, the record shows that our -- the plaintiffs in  
22 this matter, AMDEP and Able Ammo, experienced that very issue  
23 with instate ammunition vendors saying, "No thanks. We're not  
24 going to accept ammunition. We're not going to do out-of-state  
25 ammunition transaction processing anymore" or they've said,

1 "Here's our fees."

2 And there was, I believe, a declaration from one  
3 plaintiff. I don't know if -- actually, I won't go there  
4 because I don't know if it was in a declaration or in  
5 discovery. So I don't want to put anything into the record  
6 without Mr. Richards having seen it yet.

7 But -- so in any event, the commerce clause is fairly  
8 straightforward. The case -- the *Nationwide Biweekly* case --  
9 that is the only case that the State cites to in its briefing.  
10 It wasn't -- the Court did not have an issue -- the Ninth  
11 Circuit did not have an issue with the fact that the law was  
12 requiring it to incorporate. It was the effect of them  
13 incorporating that they would have to become a resident of  
14 California; in other words, having physical presence in  
15 California.

16 That's a test -- that's the problem with this law. In  
17 order for that Nevada entity to be in the same footing, to be  
18 at the same -- on the same playing field as a California  
19 ammunition vendor, it would require them to have a physical  
20 presence in the State of California. That is as clear as it  
21 gets in the commerce law -- commerce clause case law, that  
22 that's not appropriate.

23 So I --

24 **THE COURT:** Let me ask you about the Second Amendment  
25 issue because I think we've sort of danced around it a little

1 bit, but do you think there's a Second Amendment violation  
2 inherent in the law?

3 **MR. BRADY:** Are you talking about -- is Your Honor  
4 referring to the face-to-face transaction portion, or are we  
5 now talking about the background check system and all of that,  
6 too?

7 **THE COURT:** However you want to address it. I'm  
8 basically -- my recollection is that the State is saying there  
9 is no Second Amendment problem because it doesn't affect the  
10 core of the Second Amendment, because it doesn't ban handguns,  
11 which is the quintessential home self-defense weapon. We're  
12 only talking about ammunition.

13 **MR. BRADY:** Sure.

14 **THE COURT:** I think I remember that.

15 **MR. BRADY:** Yeah. That was -- so I think Your Honor  
16 is referring to the *Chovan* -- *U.S. v. Chovan* test for  
17 establishing -- for analyzing a Second Amendment challenge, and  
18 that test requires that the Court first determine whether  
19 Second-Amendment-protected conduct is at issue and then  
20 determining what level of scrutiny applies and then applying  
21 it.

22 At the first step, I believe the State argues that this  
23 scheme, California's ammunition scheme, is among those  
24 presumptively lawful regulations that *Heller* listed in a  
25 footnote about conditions and qualifications on the commercial

1 transaction of arms. I just --

2 **THE COURT:** But -- help me out with this, but my  
3 recollection is that *Heller* doesn't say that doesn't implicate  
4 the Second Amendment. It just simply says that it can be  
5 regulated.

6 I mean, we can regulate; right? We can regulate the First  
7 Amendment; right? You can't yell, "Fire" -- you can't yell,  
8 "Fire" in a crowded theater; right? Doesn't mean it doesn't  
9 implicate the First Amendment. It just simply means that  
10 you -- that the State can under certain conditions regulate  
11 that type of conduct; right?

12 **MR. BRADY:** I think that's right, Your Honor. There  
13 is debate on that. Unfortunately, that language is not  
14 entirely clear, but I think that by saying "presumptively  
15 lawful" necessarily means that there's a way to rebut that  
16 presumption.

17 And so while, even if the *Heller* court intended to say  
18 that those lists of presumptively lawful regulations, you know,  
19 are just that, presumed lawful, they could be rebutted. But I  
20 don't even think we need to get there because I don't think  
21 that this is even one of those identified regulations that are  
22 presumptively lawful.

23 The Ninth Circuit has already made clear in the *Jackson v.*  
24 *San Francisco* case --

25 **THE COURT:** I was thinking about the *Jackson* case, and

1 that's why I asked you the question.

2 **MR. BRADY:** Yes.

3 So I don't even think we need to get there, but even if it  
4 was to get more specific and drill down on, you know, "Well,  
5 they just were talking about ammunition generally," this is a  
6 specific type of thing. This is a law that is responsible for  
7 potentially 11,000 people being denied their constitutional  
8 right. It would be odd, I believe, for -- for that to not at  
9 least rise to the point of rebutting the presumption that --  
10 that it doesn't apply even.

11 So that's -- that's what I have to say about -- about the  
12 Second Amendment aspect. And I think initially, when  
13 plaintiffs brought this case, the Second Amendment aspect was  
14 to point out sort of a birdcage theory of why this law violates  
15 the Second Amendment. It's death by a thousand paper cuts, by  
16 a thousand regulations.

17 It's not necessarily one aspect of it that you can put  
18 your finger on and say, "Oh, that" -- "that offends the Second  
19 Amendment in and of itself." I think there are aspects of it  
20 that do do that. When it's this one after the other, you  
21 know -- and this is in addition to --

22 **THE COURT:** It's called *lingchi* in case you want to  
23 know.

24 **MR. BRADY:** Sure.

25 **THE COURT:** *Lingchi* is the Chinese term for what you

1 just referred to.

2 **MR. BRADY:** And, you know, it's -- this is all -- this  
3 whole scheme is graft on top of a firearm regulatory scheme  
4 that's already in place. The State has to at least implicitly  
5 admit it fails. If -- if the bad guys are getting the guns,  
6 then what is going to stop them from getting the ammunition?

7 And I think that it's necessary to understand that this  
8 law simultaneously is extremely burdensome on those who want to  
9 follow the rules and is extremely easy to lawfully bypass for  
10 those who do not. For example, as Your Honor indicated back in  
11 the dove-hunting context, non-California residents can bring  
12 all the ammunition they want into this state lawfully, and they  
13 can lawfully give it to anybody.

14 So if you have, you know, a very generous friend from out  
15 of state who visits, you know, they can, you know, come bearing  
16 gifts in the form of ammunition, and that's totally lawful. So  
17 how long --

18 **THE COURT:** Like the young man did in the Gilroy  
19 shooting. Didn't he go to Nevada and --

20 **MR. BRADY:** Well --

21 **THE COURT:** -- buy the weapon and bring it into the  
22 State of California?

23 **MR. BRADY:** Yeah. My understanding with him is he was  
24 a Nevada resident.

25 **THE COURT:** Well, he claimed to be, yeah, but --

1           **MR. BRADY:** So it was lawful for him to bring the  
2 ammunition in as a Nevada resident. If he was a California  
3 resident, it was not lawful.

4           But, you know, in any event, the bad guys -- and this goes  
5 to the whole point of the hundred or so prohibited persons that  
6 the State claims were -- were prevented from acquiring  
7 ammunition. I think it raises the question of why would  
8 somebody who knows they're prohibited or think that they're a  
9 bad guy say, "Oh, yeah, I'll submit to a background check to  
10 get ammunition"?

11           **THE COURT:** Well, 106 of them did.

12           **MR. BRADY:** Well, that's my point, is I think that  
13 what we're dealing with here generally -- first off, like I  
14 said initially, I think that some of those will turn out to not  
15 be prohibited persons.

16           There's -- there's issues with records where somebody  
17 reduced their felony to a misdemeanor under California Penal  
18 Code Section 17(b), and that should be noted as a -- as a  
19 misdemeanor for all purposes, including firearm ownership.

20           **THE COURT:** Really?

21           **MR. BRADY:** Yes.

22           And the State oftentimes does not reflect that in the rap  
23 sheet in their records for the individual. And so people who  
24 have had their firearm rights restored oftentimes will still be  
25 denied, and then unfortunately they have to hire me or somebody

1 like me to go fix the problem, and it takes quite a bit of  
2 fixing sometimes.

3 In some cases, I have clients who have tried to fix their  
4 record with the California Department of Justice for years, and  
5 so -- and this goes back to the other issue of, you know, an  
6 easy fix. That is why I'm highly dubious of the ability to  
7 easily fix potentially 11,000 folks in one month who have  
8 already, you know, shown that the system failed them.

9 So I think I was on my way to explaining why it's, you  
10 know, burdensome for most people, but then there's -- it's easy  
11 to bypass. And so at the same time, when the State is saying  
12 that they have a substantial interest, those -- those hundred  
13 folks who were rightfully or wrongly -- let's just assume that  
14 they were rightfully refused ammunition because they were  
15 indeed prohibited persons. Who knows what type of prohibited  
16 person they are, you know?

17 And this is not to say that -- to challenge the law about,  
18 you know, prohibiting certain people. But some of these people  
19 are, you know, people who had a marijuana possession felony  
20 from the 60's or 70's because, you know, they were -- they were  
21 back in the hippie days and, you know, having a joint -- a  
22 joint in the park -- and back then, it was a big deal -- and  
23 they got a felony record or -- you know, there's all -- so  
24 we're not talking about, you know, ISIS members necessarily or,  
25 you know, gang leaders.



1 Gang leaders aren't going to go buy ammunition. They're  
2 going to have their, you know, underlings go get it, or they're  
3 going to have it brought in from out of state.

4 **THE COURT:** I assume that there hasn't been enough  
5 time for the State to be able to produce information to you as  
6 to who the 11,000 people were that were rejected and why they  
7 were rejected and the 106 people that were rejected as  
8 prohibited persons as to why they were rejected unless --

9 **MR. BRADY:** There's not -- there's not been sufficient  
10 time for that. That will be coming up in discovery, not the  
11 identities of the people. I don't think the State would be  
12 able to disclose to us the identities of the people, but I  
13 think they --

14 **THE COURT:** Well, if they don't give you the identity,  
15 then how do you confirm whether or not that information is  
16 accurate?

17 **MR. BRADY:** I'm going to quote the lawyer before me.  
18 I guess we're going to have to take their word for it because I  
19 think that they would have legitimate grounds to --

20 **THE COURT:** They can redact the name.

21 **MR. BRADY:** Yes.

22 **THE COURT:** They can redact the name and Social  
23 Security number.

24 **MR. BRADY:** Correct. Yes, all identifying  
25 information.

1 But yes, I think that we would be -- and that -- so to --  
2 I think that that is almost the most crucial point of this  
3 entire motion, is understanding that the State is saying that  
4 "Oh, it was only 11,000" -- "these 11,000 people who may have  
5 an easy fix." But they have access to the records. They  
6 don't -- and they know who those 11,000 people were.

7 They don't say anything about how many of them went ahead  
8 and fixed that problem. If they had come back and said, "Yeah,  
9 11,000 people were denied for some reason, and guess what?  
10 They came back the next" -- "within the next week, and 8,000 of  
11 them fixed that problem," we would have perhaps a little bit of  
12 a different case here.

13 I would still be arguing the same, but I think here the  
14 fact that they haven't indicated whether a single one of those  
15 11,000 people has since remedied their situation with the  
16 State -- it's their burden to show that those 11,000 folks were  
17 not barred from acquisition of ammunition.

18 And just getting to the point I was making on the -- the  
19 prohibited persons being precluded from acquiring ammunition,  
20 even if -- that's been the case. I mean, if a hundred people  
21 were precluded from acquiring ammunition last month, then that  
22 means a hundred, you know, or so folks have -- prohibited  
23 persons had been acquiring ammunition every month for, you  
24 know, decades; right?

25 And that's what's going on in every state in the country.

1 That's the status quo. Prohibited persons are able to lock in  
2 and acquire ammunition. The State's own study on background  
3 checks, which are intended to preclude, you know, bad guys from  
4 getting firearms -- they had a study that said that their  
5 background check system doesn't do anything to reduce overall  
6 firearm violence or suicide.

7 In other words, just because the prohibited persons are  
8 getting this stuff doesn't really change anything because the  
9 prohibited persons who are getting this ammunition in this  
10 manner probably aren't career criminals. They just had a  
11 mistake in the past.

12 And the career criminals, the bad guys, are not going to  
13 be deterred by a background check system. You know, they're  
14 not going to go, "Oh, I was going to go, you know, have my  
15 enemy offed, but, hey, you know, I can't get ammo from the  
16 background check. So I guess that's" -- "that's canceled.  
17 That hit's canceled." That's -- that's just not the way it  
18 works.

19 So I think that's why -- and obviously, I'm speculating on  
20 all of this, but I think when you put it in context with the --  
21 I shouldn't -- I should be careful. It's not the State's  
22 study. It was a study conducted by an entity created by the  
23 State. It was the University of California that conducted the  
24 study but with -- basically under the auspices of a  
25 state-created program run by a gentleman by the name of Gary

1 Wintemute, who is a renowned pro-gun-control advocate.

2 And so I don't -- I don't see how the State can make their  
3 claim that even those -- barring those hundred folks made  
4 some -- you know, furthered some substantial interest. But  
5 even if they could, when you get to the fit part of this -- and  
6 that's all I think Your Honor needs to focus on, is whether  
7 more constitutionally protected conduct is being restricted  
8 than necessary under the tailoring aspect of this, whether it's  
9 intermediate or strict scrutiny.

10 And we've argued that strict scrutiny applies --

11 **THE COURT:** Well, let me -- I always used to tell my  
12 associates when I was a lawyer, I said, "Okay. So you've posed  
13 a problem to me. Now tell me what the solution is."

14 So give me a solution because, certainly, the State makes  
15 a good point. It's one that I agree with, and that is that we  
16 should keep both firearms and ammunition away from certain  
17 people, including people that are unlawfully present in the  
18 United States.

19 So -- so what's your creative solution? What is your  
20 group, your association that is composed of a number of  
21 gun-owners -- do you have a creative solution on how to  
22 accomplish the State's goal?

23 **MR. BRADY:** I think that one can be developed,  
24 Your Honor, that is certainly less intrusive than this but that  
25 would potentially address -- I think that, like I said, those

1 hundred folks -- I don't know why any person who believed  
2 themselves to be prohibited from owning guns would go in and  
3 undergo a background check and risk law enforcement, you know,  
4 coming after them if they -- if they knew that they were a  
5 problem person or if they were going to commit crimes with it.  
6 Why would they say, "Hey, I'm going to undergo this"?

7 So if there was -- if there was something along the lines  
8 of allowing people to -- before they purchased ammunition, to  
9 say, "Hey, can I check myself," you know -- and there is the  
10 system, by the way, but it's not readily available. You have  
11 to, like, know how to do it.

12 This is all the problem, is that there's so many moving  
13 parts and machinations with how to determine whether or not  
14 you're a prohibited person that I think most people just don't  
15 even know. A lot of people don't know that they are  
16 prohibited.

17 And so I think that a less burdensome regulation could be  
18 devised. I haven't thought of one, but I would like to make  
19 the comparison of the Fourth Amendment and how we let bad guys  
20 get away because we didn't have the evidence to get a warrant;  
21 right?

22 I mean, we don't say, "Hey, well, you know, public safety  
23 demands that we just search everybody out in the street because  
24 a bad guy might get away." That's not the way it works under  
25 the Fourth Amendment.

1 And I would submit to Your Honor that while a -- some type  
2 of scheme could be devised potentially that does not burden  
3 Second Amendment rights unduly, this one does not. And it  
4 should be respected the same as the Fourth Amendment, that  
5 we're just going to have to let some bad guys potentially get  
6 ammunition and then prosecute them after the fact.

7 This is not Minority Report where we -- the Government  
8 puts up a gatekeeping function that says, "We're going to  
9 burden everybody, and we're going to make you 11,000  
10 law-abiding people have to undergo all these additional steps  
11 to exercise your right just because we hope to accomplish  
12 stopping this bad guy." That's not the way our constitutional  
13 system works in virtually any other aspect.

14 This nation is founded on the notion of, you know, rather  
15 let ten guilty men go free than put one innocent man in jail  
16 because we have due process. This is the same thing. We're  
17 talking about a constitutional right, and so I don't -- I don't  
18 think that, you know, respectfully, the burden is on  
19 plaintiffs. I know Your Honor is asking in general, but --

20 **THE COURT:** Well, the reason why I'm asking is simply  
21 this, not that I would expect the Government to agree to a  
22 consent decree, but it strikes me that there may be a way to  
23 resolve this issue by getting the State and the plaintiffs to  
24 agree.

25 Now, it may be that the plaintiffs -- look, we all know

1 that -- the extremes of this argument. There are people who  
2 just don't like guns, they don't want guns, they don't want  
3 anyone to have guns, and they wish that the Second Amendment  
4 didn't exist, and they would do anything and everything they  
5 could possibly do to essentially extinguishing it in some way,  
6 whether it's by one fell swoop or by *lingchi*. We know that.

7 We also know that there are people that are gun-owners who  
8 don't want any restrictions at all. They want to have bazookas  
9 and stinger missiles and so on, and both of those are  
10 understandable extremes.

11 The question is, as I think we all -- I think I heard  
12 someone say that we should -- you know, we should have  
13 common-sense laws with regards to gun control. And what I'm  
14 saying is that I'm not telegraphing my -- my ultimate outcome  
15 on this so -- so we understand each other.

16 But if I were to say, "Yeah, I agree to grant the  
17 preliminary injunction," it would seem to me that reasonable  
18 minds would be able to sit down and come up with something  
19 that's less burdensome and perhaps some kind of a consent  
20 decree can be entered into whereby the State would agree to do  
21 certain things, you know?

22 Anyway, all right.

23 **MR. BRADY:** I think the impediment to that,  
24 Your Honor, would be the fact that this was made by a  
25 proposition, and this is -- this was the entire --

1           **THE COURT:** Well -- but, look, the State has the  
2   ability -- I mean, just like they did in Prop 8, they can --  
3   they can refuse to enforce a statute enacted by -- by the  
4   people -- right? -- like the Governor and the death penalty. I  
5   mean, he said, "Yeah, the death penalty has been approved" -- I  
6   don't know how many times, three, four, five times. I think  
7   the last time was 61 percent of the people. And the Governor  
8   says, "Too bad, so sad. I'm not..."

9           So the point is that this may be a legislative enactment,  
10   but the State has ways. I mean, there's ways that we can --  
11   that we can get around some of these issues, but anyway -- all  
12   right. That's a whole different kettle of fish.

13          So thank you, Mr. Richards. He's been very patient  
14   sitting here, listening. Maybe he has --

15          **THE CLERK:** Do you want a break?

16          **THE REPORTER:** Yeah.

17          **THE COURT:** Yeah. Are you doing okay? Because if  
18   you're not, I can take a break.

19          **THE REPORTER:** Can we take a break, Your Honor?

20          **THE COURT:** You want to take a break?

21          **THE REPORTER:** Please.

22          **THE COURT:** Well, I guess, Mr. Richards, how about if  
23   I give you a chance -- let's see.

24          My calendar is at 2:00?

25          **THE CLERK:** Yes, Judge.



1           **THE COURT:** How about if we come back in 45 minutes?

2           Okay. So say be back here at a quarter after 1:00, if I'm  
3 looking at that clock correct.

4           Is that okay with you?

5           **MR. RICHARDS:** Quarter after 1:00? Yes, Your Honor.

6           **THE COURT:** Okay. All right. That will give  
7 everybody a break. I'm sorry. All right.

8           **MR. BRADY:** Thank you, Your Honor.

9           **THE COURT:** We'll take a lunch break. Thank you.

10          **THE REPORTER:** Thank you, Your Honor.

11          **THE COURT:** Sorry about that.

12          **THE REPORTER:** No. It's okay.

13                 (Luncheon recess was taken at 12:29 p.m.)

14          **AFTERNOON SESSION**

**1:14 p.m.**

15          **THE COURT:** Okay. Welcome back.

16          Mr. Richards, I believe it's your turn.

17          **MR. RICHARDS:** Thank you, Your Honor.

18          As we were discussing this morning, there's a lot to talk  
19 about here. But I wanted to start out this afternoon by  
20 responding to a couple specific points that the plaintiffs were  
21 making.

22          And the first one is that plaintiffs are suggesting that  
23 the hundred-plus people who were prevented from purchasing the  
24 ammunition in July because they're prohibited people somehow  
25 doesn't advance public safety because we don't know if those

1 people are dangerous or might use those -- use that ammunition  
2 in crimes.

3 And I'd like to direct the Court's attention to Exhibit 2  
4 of our request for judicial notice. That's a 20 -- or 2008  
5 ammunition ordinance presentation by the Sacramento Police  
6 Department. And among other sources of evidence, I think that  
7 this document shows that pertinent people who purchase  
8 ammunition from lawful vendors are criminals and are dangerous  
9 criminals.

10 In particular, I would direct the Court's attention to a  
11 page in the presentation -- they're unnumbered, but it's ECF  
12 Page 31, and that's in Docket No. 34-7, where you can see that  
13 as a result of a search warrant obtained because someone had --  
14 a prohibited person had purchased ammunition in Sacramento  
15 County, they uncovered some pretty serious illegal firearms,  
16 including what appeared to be a hundred round magazines and  
17 assault rifles.

18 In addition to that, the Sacramento Police Department  
19 uncovered additional evidence of crimes such as burglary,  
20 theft, other forms of theft, drugs, and that sort of thing. So  
21 we do know that prohibited people purchase the ammunition and  
22 use them in crimes.

23 **THE COURT:** Wait. So -- so if someone goes and  
24 applies to buy a firearm or ammunition, then they're a  
25 prohibited person? That then leads to a warrant being issued

1 for the search of their premises?

2 **MR. RICHARDS:** I believe so, yes. This is, you'll  
3 recall, in 2008, before the State's ammunition law went into a  
4 check -- the State's ammunition background law went into  
5 effect.

6 And at that point, I believe that if a police department  
7 or other law enforcement agency had evidence that a prohibited  
8 person had obtained ammunition, that would provide probable  
9 cause for a warrant. And indeed, I think that happened on  
10 numerous occasions, as is outlined in this exhibit.

11 **THE COURT:** I see.

12 So they weren't rejected. They actually were able to buy  
13 the ammunition.

14 **MR. RICHARDS:** That's correct, and that's because the  
15 way that both the Sacramento and Los Angeles County ordinances  
16 worked, they didn't -- they didn't have access to the State's  
17 databases or to large databases. They only had access -- they  
18 weren't able to set up a system using state resources because  
19 they're county government.

20 So the way they did these background checks in their  
21 ordinances was to require the person, the purchaser, to provide  
22 a list of information, including their name, address, various  
23 other information, including a thumbprint and a signature.

24 **THE COURT:** But that doesn't necessarily translate --  
25 I mean -- so what I think I understood Mr. Brady to say was

1 "Now, look, if you were someone who was convicted back in the  
2 60's of smoking a joint, you would have a felony on" -- "on  
3 your record. So now you'd be a prohibited person."

4 But simply because you had been convicted of smoking a  
5 joint in the 1960's -- can you believe that? In the 1960's, if  
6 you had a joint, it was a felony, and today you can have --

7 **MR. RICHARDS:** That's a different topic, Your Honor.

8 **THE COURT:** -- a hundred quantities and it's a  
9 misdemeanor? In fact, it's legal to possess it and smoke it  
10 out on the street.

11 So -- so why would that give someone, an officer, probable  
12 cause to go and search your premises? I mean, what's the  
13 connection between the two, the fact that I smoked a joint in  
14 1960 and the fact that today I've decided to go buy some .22  
15 rounds to go plinking?

16 **MR. RICHARDS:** Well, Your Honor, I think what you're  
17 discussing here is a concern about overbreadth with regard to  
18 the federal prohibition on prohibited people possessing  
19 ammunition and the inclusion of all felons in that group.

20 Certainly, the type of person you're discussing could  
21 attempt to bring a facial challenge -- excuse me -- an  
22 as-applied challenge to that law, saying, "Hey, I just smoked  
23 some dope in the 60's, and I've otherwise been a law-abiding  
24 citizen. I'm not dangerous."

25 **THE COURT:** Why would we want to make that an

1 individual -- I want you to -- look, you're the -- you're the  
2 State. By the way, it's not -- you've done a wonderful job so  
3 far. So I'm not talking about you personally. All right?

4 **MR. RICHARDS:** Thank you, Your Honor. I understand.

5 **THE COURT:** But you're representing the People of the  
6 State of California. That -- that includes people who like  
7 guns, people who don't like guns. It includes people who are  
8 prohibited people and people who are not prohibited people, and  
9 we all are entitled to get the same representation from you.

10 Some poor person who was convicted of smoking marijuana  
11 back in 1960 now is put into a position where he or she -- I  
12 mean, they may not have any money at all, but now they're put  
13 into the position that if they want to go buy a box of .22 ammo  
14 to take their child or grandchild or -- to just go plinking,  
15 they have to sue the State, and they have to -- and they have  
16 to -- they have to face you.

17 I mean, that's a pretty daunting ordeal, and multiply that  
18 out times a number of people that might possibly have the same  
19 type of situation. Do you see what I'm saying? So I'm not  
20 sure that your remedy is really -- it may be a remedy, but it's  
21 not a realistic remedy.

22 **MR. RICHARDS:** Well, with respect, Your Honor, I think  
23 there's a couple things here.

24 **THE COURT:** Okay.

25 **MR. RICHARDS:** First, yes, I do believe it is a

1 remedy, and I want to correct something that -- at least it was  
2 a misunderstanding on my part, based on the colloquy you were  
3 having with Mr. Brady earlier today, where the suggestion was  
4 that because someone can't bring a facial challenge, that means  
5 that an as-applied challenge can only apply to the specific  
6 individual in the courtroom.

7 There are -- there are scenarios where an individual --  
8 individual can represent a group of similarly situated people  
9 and bring essentially an as-applied challenge that doesn't seek  
10 to invalidate the law in all its applications but seeks to  
11 invalidate the law, rather, with regard to certain  
12 characteristics or traits.

13 So the example that you're talking about -- there may be a  
14 whole group of people like this, and one of them would bring  
15 the -- one or a group of them could bring a claim, indeed, much  
16 like this case. If it were as simple as Mr. Brady was  
17 suggesting, there would be no need to have the individual  
18 plaintiffs named in this case, which -- they're here. They  
19 joined the case. It could have just been brought by the CRPA,  
20 and it wasn't.

21 And I think that part of the case, we have some arguments  
22 about why they have standing issues. But generally speaking,  
23 that might be how you would go about challenging the law if it  
24 applied to you. And as we've argued, in most cases in this  
25 situation and in this case, it doesn't apply to plaintiffs.

1 But to go to your second point about your hypothetical,  
2 that prohibition is a federal prohibition. So it wouldn't be  
3 the State of California defending it. It would be the federal  
4 government. That's a -- that's a -- the ban on felons  
5 possessing ammunition and firearms is in 18, U.S.C., 922. And  
6 so that's just the product of federal law.

7 So there may be concerns about how broadly it applies or  
8 the policy and determinations that both or either the  
9 California legislature or Congress has made, but those are  
10 positions or issues best taken up with Congress, the  
11 legislature, or the voters.

12 So the fact that there may be some people who are  
13 sympathetic or that --

14 **THE COURT:** Let's clear something up, though. In  
15 your -- in your opposition somewhere, I thought I read that you  
16 do not think this scheme implicates the Second Amendment.

17 Did I read that?

18 **MR. RICHARDS:** Yes.

19 **THE COURT:** And I thought you said something to the  
20 effect that "Well, this isn't a complete ban on the  
21 quintessential home defense weapon; i.e., the handgun."

22 But hasn't -- refresh my recollection. Doesn't the  
23 *Jackson* case speak against your position?

24 **MR. RICHARDS:** No, Your Honor, but I think -- let me  
25 clarify that answer and clarify the position in our brief.

1       *Heller* and *McDonald*, the two cases where the Supreme Court  
2 has recognized the Second Amendment right, were focused on a  
3 handgun in the home for self-defense. Those are the holdings  
4 in those cases. Subsequent cases expanded those holdings in  
5 various areas, and we don't -- we don't dispute or contest  
6 those cases.

7       Your Honor pointed to *Jackson* as an example, and we do not  
8 contest that ammunition is subject to protections of the -- of  
9 the Second Amendment. That -- the Ninth Circuit held that in  
10 *Jackson*, and we are accepting that as law in this case. But  
11 that said, in *Heller*, the Supreme Court still recognized that  
12 there were presumptively lawful regulations that would fall  
13 outside the Second Amendment and -- and essentially be upheld  
14 without further question.

15       Our contention is that in this case, this particular  
16 regulation of ammunition is just one such of those  
17 presumptively lawful regulations as a restriction on the  
18 commercial sale of ammunition and firearms.

19       **THE COURT:** And the reason why is?

20       **MR. RICHARDS:** Because it -- it's -- it is a  
21 commercial restriction on the -- the sale of -- of --

22       **THE COURT:** So let's see -- since -- I'm trying to  
23 remember who does this or who said they do this, but I do it  
24 quite often. I argue from extremes.

25       So let's assume hypothetically, if you will, that the



1 State of California has decided that the Second Amendment  
2 should be repealed, but they know they can't do that. "So what  
3 we're going to do is we're going to make it as difficult as we  
4 possibly can for its citizens to exercise their Second  
5 Amendment rights."

6 So then they say, "Well, you know what? We're going  
7 to" -- "we're going to enact laws that say that you can only  
8 buy one round of ammunition a year."

9 What do you think about that?

10 **MR. RICHARDS:** That law would probably be  
11 constitutionally infirm, Your Honor.

12 **THE COURT:** How about if they said five rounds?

13 **MR. RICHARDS:** Also probably constitutionally infirm.

14 **THE COURT:** How about if they said, "You can buy  
15 ammunition, but you can only buy ammunition if you give us a  
16 blood sample"?

17 **MR. RICHARDS:** That's getting a little farther afield,  
18 and it would depend on the -- the evidence and analysis and the  
19 reasons for that.

20 And, Your Honor, there's a problem here with -- with a  
21 line drawn like this. I mean, Your Honor is posing  
22 hypotheticals, all of which have pretty clear constitutional  
23 implications, and those laws probably would be  
24 unconstitutional.

25 But the -- the Second Amendment -- indeed, regulation in

1 any area doesn't lend itself to exact bright-line line-drawing  
2 of this sort.

3 **THE COURT:** I think it does.

4 So what we have to do is decide whether or not this law is  
5 a reasonable fit; right?

6 **MR. RICHARDS:** If we make it to that step in the  
7 analysis, yes. I think that there -- there's an argument that  
8 the amicus brief submitted by Everytown USA in this case --  
9 that outlines a very strong argument supporting the argument we  
10 made in our brief about why this is a presumptively lawful  
11 regulation.

12 But we also noted in our brief that every Ninth Circuit  
13 case that has considered this question, including, I believe,  
14 most recently in the *Pena* case -- the Ninth Circuit has said,  
15 "Well, we're going to do the intermediate scrutiny analysis  
16 first because the law survives under that analysis," and that's  
17 what we believe should be done here.

18 So while it is --

19 **THE COURT:** Was *Pena* -- was the *Pena* case the -- was  
20 that the micro-stamping?

21 **MR. RICHARDS:** Yes, Your Honor, and --

22 **THE COURT:** So you want to test my clairvoyance?  
23 Here's my clairvoyance.

24 I predict that within the next ten years, the State of  
25 California will decide that there's a loophole in our gun laws,

1 and the loophole is that when they enacted the micro-stamping  
2 statute, they left a loophole for those people who possessed  
3 guns that do not have micro-stamping capabilities.

4 And so therefore, they will have to enact a law requiring  
5 people who possess guns that don't micro-stamp, and they're  
6 going to have to sell them or ship them out of state because of  
7 the loophole created by that statute.

8 Would you like to put some money on it?

9 **MR. RICHARDS:** Your Honor, actually, I don't think  
10 that that's probable. But I'd also point out that the  
11 micro-stamping can be achieved on the firing pin of the  
12 firearm, which is a replaceable component, but that's neither  
13 here nor there. But I see what Your Honor is saying.

14 Nonetheless, the standard that the Court discussed in that  
15 case or that approach the Court took, I think, provides  
16 guidance here. And I'll just, as an aside -- this is an aside,  
17 but this is also a significant point.

18 If you examine the plaintiffs' briefing, both their  
19 opening brief and their reply brief, they rely on essentially  
20 no Ninth Circuit controlling authority to discuss intermediate  
21 scrutiny. They cite *Chovan* to talk about the two-step  
22 analysis, but then they cite no cases, some of which are pretty  
23 close to on point here, if not directly on point, about the  
24 standards and the burdens that apply.

25 And I think the cases that are most directly on point are

1 *Silvester* and *Jackson*, and it's hard to see -- and the  
2 plaintiffs have not explained in their briefing -- you'd think  
3 that this would be sort of self-evident -- that if you can have  
4 a ten-day waiting period to purchase a firearm, that the  
5 ten-day waiting period to purchase ammunition or a waiting  
6 period to purchase ammunition would -- would need to be  
7 addressed at least if you're talking about alleged delays or  
8 burdens --

9 **THE COURT:** So is there a ten-day waiting period?

10 **MR. RICHARDS:** There's no evidence that that's the  
11 case. There are certain people --

12 **THE COURT:** No. Wait. But -- but -- either Mr. Brady  
13 was being less than candid with me or something you just said  
14 is not quite accurate.

15 So if I go buy a weapon, there's a ten-day waiting period  
16 for me to get that weapon, and that's it. So I do my  
17 background check, and there's a ten-day waiting period. I get  
18 my weapon; right?

19 On the other hand, if you are someone who is not a  
20 prohibited person and goes to apply to buy the ammunition and  
21 is rejected like the 11,000 people that have been rejected,  
22 we're not talking about a ten-day waiting period, are we?

23 We're talking about a whole lot longer than a ten-day  
24 waiting period because now they've got to do all of these other  
25 things in order to be able to get themselves in a position

1 where they can get their ammunition; right?

2 **MR. RICHARDS:** No, Your Honor. That's incorrect, and  
3 I believe there's several things that I'd like to correct in  
4 that --

5 **THE COURT:** Okay.

6 **MR. RICHARDS:** -- in that discussion, some of which  
7 were raised earlier this morning that I was --

8 **THE COURT:** All right.

9 **MR. RICHARDS:** -- going to get to eventually anyway.  
10 To start with, the comparison to the ten-day waiting  
11 period to purchase a firearm -- that is the statutory period  
12 for purchasing a firearm. However, it can take longer than  
13 that if the department is unable, using its records, to  
14 determine whether you're a prohibited person or not.

15 This comes up most often in the context where someone has  
16 a criminal history but the disposition of that history isn't in  
17 the system. So the Bureau of Firearms that administers the  
18 background check process needs to check and confirm what the  
19 nature of that criminal history is to see if you're a  
20 prohibited person.

21 So that's something that can happen with firearms, too.  
22 The standard waiting time is ten days, but the checks can -- or  
23 the background check process can go on longer if there's a need  
24 to do that.

25 And that actually ties over into the ammunition context

1 because at bottom, every person who's eligible to purchase  
2 ammunition can use the basic ammunition eligibility check,  
3 which is essentially the same process as the firearms  
4 background check minus --

5 **THE COURT:** Refresh my recollection. What is that  
6 again?

7 **MR. RICHARDS:** So there are three types of background  
8 checks. There's actually four ways that you can purchase  
9 ammunition. The first one, we haven't discussed much. You can  
10 buy ammunition when you purchase a firearm. You go through the  
11 firearms background check. It's good enough. The check  
12 cleared. You can purchase the ammunition.

13 Outside that --

14 **THE COURT:** But you can only buy it at that time;  
15 right? That only qualifies you to buy the ammunition while  
16 you're buying the firearm; right?

17 **MR. RICHARDS:** That's correct, but --

18 **THE COURT:** Okay.

19 **MR. RICHARDS:** -- in conjunction with purchasing that  
20 firearm, you will then have an AFS entry and be able to do the  
21 standard.

22 The next check, though, that's been discussed, which is  
23 the standard ammunition eligibility check or what's called the  
24 AFS check for short -- that's for people who have entries in  
25 the Automated Firearm System. They can go in the store, as

1 Mr. Brady described, pay a dollar, and have the check run in a  
2 relatively short amount of time. The evidence that we  
3 submitted shows that takes on average less than five minutes.

4 This -- the third kind of check is the --

5 **THE COURT:** But if you don't -- but if you haven't  
6 purchased a firearm like the example I used, having bought a  
7 long gun, say, in 2000 or 2002, you're not going to be in the  
8 AFS system. So that's not going to apply to you; right?  
9 Doesn't work for you?

10 **MR. RICHARDS:** At that time and if you take no further  
11 steps, that's correct. You would use the next type of  
12 ammunition check, which is a basic -- called a basic ammunition  
13 eligibility check, and that is essentially a background check  
14 run by the Bureau at that time.

15 I would just point out with regard to what your -- the  
16 situation that Your Honor was talking about, purchasing a long  
17 gun before 2014 and it wasn't registered for some other reason  
18 in the system, you can still submit a firearms report to the  
19 Bureau and have that firearm entered in AFS so that you can use  
20 AFS going forward.

21 So if you bought a long gun in 1995, you can submit this  
22 report to the Bureau and get an AFS entry for that firearm.  
23 That would allow you -- allow you to use the standard  
24 ammunition --

25 **THE COURT:** And how would I know that?

1           **MR. RICHARDS:** It's available on the department's  
2 website. If you go to the California Department of Justice's  
3 Bureau of Firearms website, there's discussions that describe  
4 all these processes on there, and I believe it's laid out  
5 fairly -- fairly clearly.

6           You know, there's different situations for different  
7 people, but they -- these options are highlighted for -- for  
8 purchasers.

9           **THE COURT:** And if you're an old dinosaur like me who  
10 doesn't know how to use the Internet?

11           **MR. RICHARDS:** Hopefully, your local firearms dealer  
12 can direct you to the resources and help you do what you need  
13 to do.

14           **THE COURT:** All right. Good enough.

15           **MR. RICHARDS:** Just to tie up the discussion --

16           **THE COURT:** What's the fourth one?

17           **MR. RICHARDS:** I was just going there, Your Honor.

18           That's the Certificate of Eligibility verification check.  
19 That's essentially the same check as the standard ammunition  
20 eligibility check except for it's relying on your status as a  
21 COE-holder to deem you, you know, authorized to purchase  
22 ammunition and just make sure that that certificate is still --

23           **THE COURT:** Is that the one that's good for 18 months  
24 or something?

25           **MR. RICHARDS:** I believe it's good for a year,



1 Your Honor, and you can renew it annually --

2 **THE COURT:** Okay.

3 **MR. RICHARDS:** -- with a relatively -- relatively  
4 straightforward process.

5 **THE COURT:** Let me ask you a question. So there are a  
6 lot of people that are concealed-carry weapon --  
7 concealed-carry permit holders.

8 Now, before you can become a concealed-carry  
9 permit-holder, you have to go through a background check;  
10 right?

11 **MR. RICHARDS:** Yes.

12 **THE COURT:** And if you purchased your weapon before  
13 2000 -- what did you say? '14?

14 **MR. RICHARDS:** A long gun, yes.

15 **THE COURT:** Yeah.

16 You wouldn't be in the AFS system; right?

17 **MR. RICHARDS:** That's correct.

18 **THE COURT:** But you'd have this permit that allows you  
19 to carry this weapon. You've -- you've had to pass a  
20 proficiency test, you've had to take other tests, and you've  
21 had to -- I can't remember if you had to do -- renew the target  
22 practice every so often.

23 But there's no exception for -- for a concealed-carry  
24 permit-user in the law, is there?

25 **MR. RICHARDS:** Under the ammunition background check

1 law --

2 **THE COURT:** Yeah.

3 **MR. RICHARDS:** -- there's no exemption from the  
4 background check laws for those purchasers. They would either  
5 use the basic ammunition eligibility check if they didn't have  
6 an AFS entry or use the standard ammunition eligibility check  
7 if they did have an AFS entry.

8 **THE COURT:** Do you happen to know -- does the State  
9 have any statistics about how many shootings -- how many -- how  
10 many, quote, "gun violence incidents" there's been with people  
11 who hold -- or by people who hold a concealed-carry permit?

12 **MR. RICHARDS:** Not that I'm aware of, Your Honor.

13 **THE COURT:** You don't know those statistics?

14 **MR. RICHARDS:** I don't know if there are statistics or  
15 not.

16 **THE COURT:** Okay.

17 **MR. RICHARDS:** I would also point out -- and I believe  
18 it was a concealed-carry permit, but this was essentially the  
19 challenge that the plaintiffs in *Silvester* brought. They  
20 weren't just random people who want -- or the average firearm  
21 person -- person who wanted to purchase a firearm.

22 They were people who had concealed-carry permits, who had  
23 multiple firearms, and were essentially making the same  
24 argument that Your Honor's outlining here, that they had  
25 already passed background checks and gone through extensive

1 training and other -- other things that they argued would  
2 suggest that they were not dangerous, and the Court rejected  
3 that challenge.

4 And that's another reason why that case is stronger  
5 authority here for a background check with much shorter  
6 duration. The standard ammunition eligibility checks, of which  
7 there were over 40,000 in July, averaged just under five  
8 minutes. So when you're talking about a burden on people, it's  
9 a dollar.

10 **THE COURT:** I thought it was 60 -- I thought it was  
11 68-.

12 **MR. RICHARDS:** There was 68,000 transactions processed  
13 for all types of background checks. Of those, I believe there  
14 were -- I'm speaking roughly here. I'd have to refer to the  
15 Morales declaration to get the exact numbers. But  
16 approximately 57,000 were standard ammunition eligibility  
17 checks, and of those, 18 to 19 percent were rejected.

18 And that gets to another point that I wanted to discuss  
19 with the Court because I don't want to leave the Court with the  
20 impression that a rejection of a standard ammunition  
21 eligibility check means that you can't purchase ammunition.

22 First of all, that number may be inflated for any number  
23 of reasons. I think Mr. Brady even -- I don't think  
24 intentionally, but suggested one reason, and Your Honor was  
25 talking about it as well this morning when you said, "Well, can

1 a person just run a check to see if they have an AFS entry?"

2 So everyone who did that, Mr. Brady said, was a large  
3 number of people who were doing this. Those are going in as  
4 rejections because those people don't have AFS entries. So  
5 that number can be high for any number of reasons that -- the  
6 clerk entering the transaction could mistype.

7 So we don't know that those people that are actually  
8 individual people -- that there's a reason why they should have  
9 been able to use that process and they weren't. And, again,  
10 this highlights the reason why facial challenges aren't good to  
11 test these things and why you need plaintiffs to actually  
12 experience what they're complaining about so that we can figure  
13 out what's going on.

14 As we outlined in our papers, even those people who have  
15 AFS entries who were rejected may have a very quick solution to  
16 solve that. There's an online database called CFARS, which  
17 stands for the California Firearms Application Reporting  
18 System.

19 **THE COURT:** Hang on.

20 California Firearms Reporting System?

21 **MR. RICHARDS:** California Firearms Application  
22 Reporting System. It's CFARS for short, C-F-A-R-S.

23 **THE COURT:** All right.

24 **MR. RICHARDS:** And, again, this system is described on  
25 the Bureau of Firearms website as well.

1 But this system allows people to -- who have received a  
2 rejection from purchasing firearms to go on and correct certain  
3 potential reasons why they were rejected, as you described this  
4 morning, a change in address, for example, change in name,  
5 those sorts of things.

6 **THE COURT:** Are they told that? So if I go in and I'm  
7 rejected, are they -- are they told -- are they told that? Are  
8 the people given information? Is there a disclosure telling  
9 them, "Okay. This is why you were rejected. This is how you  
10 can fix it"?

11 **MR. RICHARDS:** As part of the process, you will --  
12 someone undergoing a background check will get a number that  
13 they can -- they can go -- log onto the CFARS system and look  
14 at the reason for the rejection. I don't know if it  
15 necessarily suggests that "Here's how you fix it," but I do  
16 know that --

17 **THE COURT:** Yeah.

18 **MR. RICHARDS:** -- vendors are -- in the vendor  
19 guidelines, there's discussions of providing that number to  
20 people so that they can -- they can go check.

21 **THE COURT:** So if I leave here this afternoon and I go  
22 to Turner's and -- well, no. That's not going to work. I'm  
23 trying to figure it out.

24 So somebody goes to buy some ammunition, and they're  
25 rejected; right? They're not told why they were rejected, but

1 they can go to this website. So they can immediately -- if  
2 they have a Smart Phone, I suppose, they can get on their Smart  
3 Phone, go to that website, and then see why they were rejected,  
4 and it might be something that they can fix quickly?

5 **MR. RICHARDS:** Yeah, and relatively quickly in the  
6 context of an address change. I think it would be -- again,  
7 there's processing times, depending on how many people are  
8 submitting changes at that time. It can vary, but it's a  
9 matter of minutes. I think it lasts a little longer if it's a  
10 busy time.

11 And I don't know the exact nature of -- of what the  
12 denial -- you know, what someone is told when they're denied.  
13 But, you know, I think it's important to keep in mind -- and  
14 this is what I was getting to a little bit earlier. If that  
15 happens to you, if you submit a standard ammunition eligibility  
16 check and you are rejected, you can still submit the basic  
17 ammunition eligibility check and go through that process.

18 And essentially, what's going on here in the background is  
19 if you have an entry in AFS and the vendor can confirm who you  
20 are -- that's why the ID requirement's important. It confirms  
21 that the person there is the person on the identification card,  
22 the person on the identification card is the person with the  
23 entry in the Automated Firearms System.

24 The Bureau can then run that name against the armed  
25 prohibited persons list and determine whether you're -- you're

1 authorized to possess a -- to purchase or possess ammunition.

2 **THE COURT:** Let me ask you. That brings me to a -- to  
3 a question.

4 What's the point of this face-to-face requirement on the  
5 sale of -- or the -- or the transaction of the purchase of --  
6 of ammunition? What's the point of that?

7 **MR. RICHARDS:** Well, it's to confirm that the person  
8 purchasing the ammunition is the person on the identification  
9 card and that the background check can be run on that person,  
10 that the person there with the identification is the person who  
11 is in the system and who's actually -- actually purchasing the  
12 ammunition.

13 I should note that background checks -- or excuse me --  
14 face-to-face transactions are not uncommon. I mean, New York's  
15 face-to-face ammunition background check was upheld in the *New*  
16 *York State Rifle and Pistol Association v. Cuomo* case that we  
17 cite in our brief.

18 **THE COURT:** Is that still in effect?

19 **MR. RICHARDS:** That law?

20 **THE COURT:** Uh-huh.

21 **MR. RICHARDS:** That law is on the books, but I believe  
22 that New York has not implemented it.

23 **THE COURT:** Yeah.

24 **MR. RICHARDS:** The face-to-face aspect may actually be  
25 implemented, but the background check process in New York has

1 not implemented, I believe.

2 **THE COURT:** That reminds me, by the way.

3 So Sacramento and LA had an ammunition registration  
4 program at one time; right?

5 **MR. RICHARDS:** Sure. Ammunition ordinances, yes.

6 **THE COURT:** Yeah.

7 And the rejection rate on one was, like, 2.6, and the  
8 other one was 3.4 percent?

9 **MR. RICHARDS:** Yes, two to three percent.

10 **THE COURT:** But in -- California's statewide is  
11 18 percent so far, right, as best as we can determine?

12 **MR. RICHARDS:** I want to be clear here. I think using  
13 different terminology can help here.

14 **THE COURT:** Okay.

15 **MR. RICHARDS:** I think if we talk about denials as a  
16 determination that someone is a prohibited person and therefore  
17 can't possess ammunition and we talk about a rejection as a  
18 particular method for running a background check that can't be  
19 processed, those are two different things.

20 So what we have in Los Angeles and Sacramento is two- to  
21 three-percent denials. That's the determination that -- well,  
22 they're not denials, but they're a determination that those  
23 people are prohibited persons.

24 The 18-, 19-percent rejection rate in California under the  
25 standard ammunition eligibility check is just a determination



1 that those purchasers weren't eligible to use that specific  
2 check because they didn't have an AFS entry. Their record  
3 didn't -- their identification didn't match their AFS entry.

4 **THE COURT:** So if I understand you correctly, the  
5 right calculation would be to take the 106 and divide that by  
6 the 68,000?

7 **MR. RICHARDS:** That would be -- that would be one way  
8 to do it. But, again, I think it's not quite the -- it's not  
9 quite the same comparison because the -- we know that the  
10 standard ammunition eligibility check is going to have a lower  
11 hit rate on prohibited people because a lot of those people  
12 have already undergone background checks, but it's still  
13 picking up prohibited people.

14 And the State's armed prohibited persons file or system  
15 that operates has approximately 20- to 24,000 people who at one  
16 time were able to purchase a firearm but have since become  
17 prohibited people, and this is something that the State -- it's  
18 an ongoing issue in the state of making sure that people who  
19 were once lawful possessors of firearms but have since become  
20 prohibited don't get to keep those firearms.

21 And this is one step in -- in that process of making sure  
22 the prohibited people who purchased a lawful -- lawfully  
23 purchased a firearm at some point don't get to keep having it  
24 now that they're prohibited.

25 So that's -- that's what the standard ammunition

1 eligibility check is doing. And, again, that's a very short  
2 check for -- for those people who have entries in the system,  
3 but the default in the background -- the fallback is the basic  
4 ammunition eligibility check, and everyone can do that.

5 That check consists of the Bureau essentially running the  
6 same background check it would on a firearm transaction minus  
7 the federal NCIS background check. So that background check  
8 looks at four databases, one that has convictions, one that has  
9 restraining orders, one that has mental health holds. I  
10 believe one has warrants.

11 It draws from that information to determine whether  
12 someone is a prohibited person or not. And that's why the  
13 basic ammunition eligibility check can take longer, because if  
14 you run that check using the person's identifying information  
15 and some form of criminal history comes up, someone at the  
16 Bureau is going to have to check that to make sure the person's  
17 not prohibited.

18 Now, if you have no criminal history, my understanding is  
19 that those background checks run fairly -- fairly quickly, in a  
20 matter of minutes or hours, not days. But if you have some  
21 sort of criminal background, if there's some flag in the  
22 system, that means it's going to require what's called a manual  
23 review, manual check.

24 And that can take a couple days, if not in some cases  
25 longer, for the same reasons that I was describing with regards

1 to firearms background checks, just confirm that the person  
2 who's there doesn't have a prohibiting offense on their record.  
3 So those people are going to --

4 **THE COURT:** Well, let me ask you from a practical  
5 perspective, though.

6 So say you go in for an AFS and you do this AFS check and  
7 your -- and you pass that check; right? So what's so -- we  
8 know you're not here -- you're not unlawfully present in the  
9 United States. We know you have a firearm. We know that you  
10 don't have a criminal history or record.

11 Why not give that person, say, for example, a 12-month  
12 permit so that he or she can go buy ammunition and whatever  
13 they need to during that 18 months or that 12 months?

14 **MR. RICHARDS:** Because people are added to the arms --  
15 armed prohibited persons file all the time. I believe in 2018,  
16 11,000 people were added to that list. Again, that's a list of  
17 people who once lawfully purchased or possessed firearms that  
18 have since become prohibited.

19 So that's an ongoing --

20 **THE COURT:** But how is that different when that  
21 happens with a Certificate of Eligibility? Right?

22 So you go in, you get the Certificate of Eligibility, you  
23 get this permit that allows you to buy ammunition for -- is it  
24 12 months or 18 months? I can't remember.

25 **MR. RICHARDS:** I believe it's 12.

1           **THE COURT:** 12 months; right?

2           So what's the difference?

3           **MR. RICHARDS:** I believe if you get a -- if you become  
4 prohibited, then you would lose your Certificate of  
5 Eligibility. I'd have to double-check on that.

6           But I don't believe that there's -- there's no -- it  
7 doesn't matter if you have a CO -- COE or Certificate of  
8 Eligibility. If you get a conviction that makes you a  
9 prohibited person, I think that would disqualify your COE, but  
10 I would have to double-check with the Bureau.

11           **THE COURT:** So if I have a COE, every time I want to  
12 buy ammunition, I have to somehow or another let them know that  
13 I have this COE? Otherwise --

14           **MR. RICHARDS:** Yes.

15           **THE COURT:** Is that correct?

16           **MR. RICHARDS:** That's correct.

17           **THE COURT:** And so sometime in the process, I become a  
18 prohibited person. Then there's going to be some entry that  
19 revokes my COE. Is that --

20           **MR. RICHARDS:** I believe -- I believe so. Again,  
21 that's the thing I'd have to double-check on.

22           **THE COURT:** Look, if you don't know -- you're the  
23 State, man.

24           **MR. RICHARDS:** Well, this is a question that hasn't --  
25 hasn't been raised.

(Laughter)

**MR. RICHARDS:** And, again, we're back -- we're back to my sort of common theme for today, which is this is why facial challenges don't work because -- in this context, where there's no plaintiff, there's no one -- there's no COE-holder in this case saying, you know -- you know, "I was trying to purchase ammunition, and they said I was prohibited, and I'm not," that sort of thing.

Those are the types of cases that can be heard and these type of questions can be answered.

**THE COURT:** Yeah. It goes to the fit. In my opinion, this all goes to the fit.

So the State has enacted this scheme, and the question is: Is it really -- really a reasonable fit to what the State is trying to accomplish?

**MR. RICHARDS:** And I would direct the Court to *Silvester* and *Jackson* and -- indeed, a whole slew of other Ninth Circuit cases, but those two in particular -- and say, "Yes." I mean --

**THE COURT:** Okay.

**MR. RICHARDS:** -- just taking *Jackson*, for example, the handgun storage requirement, you can make the same type of argument with regard to handgun storage.

Why should someone who's gone through a CCW training and, you know, is an expert marksman and a gun safety enthusiast and

1 all this sort of thing -- why should they have to lock their  
2 guns up just like the novice who purchased their first handgun?  
3 And the same type of finish is there.

4 The same thing in the *Silvester* case. Why should the  
5 multiple-firearms owner, CCW carriers -- why should they have  
6 to go through the ten-day cooling-off period just like anyone  
7 else? And, again, fit was deemed to be satisfactory there and  
8 within constitutional bounds.

9 And this case is no more onerous. I mean, again, for the  
10 people with the -- with the AFS entries and the -- and the  
11 COE's, we're talking a matter of minutes and a couple of -- a  
12 dollar, not even a couple dollars.

13 So the burden here is very slight in terms of when you  
14 start looking at some of the other burdens that have been --  
15 that have been upheld, and it's no different than -- than a  
16 firearm background check that people often go through when they  
17 purchase firearms and other laws of that nature.

18 So when you're talking about the fit, this is something  
19 that's well within the established norm. And, again, that's  
20 what I was talking about earlier this afternoon when I was  
21 saying it's hard to understand how plaintiffs didn't at least  
22 try to distinguish these cases.

23 They didn't discuss them at all, and I think it's because  
24 they're -- they're directly on point, and they tell the Court  
25 which direction it needs to go both on analogizing to the facts

1 but also on the standard that should apply, how intermediate  
2 scrutiny works.

3 Again, I think the Ninth Circuit has now outlined,  
4 discussed, set forth the intermediate scrutiny standard that  
5 applies in these cases multiple times, starting in *Chovan*,  
6 going all the way up most recently in -- *Pena*, I believe, was  
7 the most recent one. But all those cases say essentially the  
8 same thing.

9 **THE COURT:** Can you -- can you tell me, has the Ninth  
10 Circuit ever found a -- well, in general, a gun restriction  
11 that did not -- that was not a reasonable fit?

12 **MR. RICHARDS:** I don't know if it has. I --  
13 certainly, we didn't --

14 **THE COURT:** Mr. Brady, do you know one?

15 **MR. BRADY:** Well, Your Honor, there have been a couple  
16 panels that have struck down certain restrictions as violative  
17 of the Second Amendment, and then one was taken en banc. It  
18 was a carry case, a right to bear arms for those --

19 **THE COURT:** Was that *Peruta*?

20 **MR. BRADY:** That was *Peruta*. It was taken en banc,  
21 and it was over- -- the panel decision was overturned on the  
22 basis that the appellants were requesting a right to  
23 conceal-carry, not just to carry. There is no such right.  
24 They did not articulate whether there was or was not a right to  
25 bear arms, which prompted several other cases to work their way

1 up there.

2 There was a case against the State of Hawaii, basically  
3 the *Peruta* against Hawaii, that those plaintiffs challenged  
4 open and concealed-carry restrictions, saying they would take  
5 either license. And a panel of the Ninth Circuit agreed that  
6 that was a violation of the Second Amendment, and that case,  
7 too, has been taken en banc.

8 Every pro --

9 **THE COURT:** It hasn't been decided yet?

10 **MR. BRADY:** Yes.

11 Every pro-Second-Amendment opinion to come out of a Ninth  
12 Circuit three-judge panel has been taken en banc and  
13 overturned. Not a single Ninth Circuit panel that has upheld a  
14 law has been taken en banc.

15 **THE COURT:** The reason -- the reason why I ask the  
16 question is because it kind of gives me -- again, it's not  
17 parameters. It tells me what the Ninth Circuit has found to be  
18 acceptable and what is not acceptable. I think I have some  
19 parameters on the one side. I have no parameters on the other  
20 side.

21 So -- okay. Good enough. Go ahead. I'm sorry.

22 **MR. RICHARDS:** That's okay.

23 And I think that, again, *Silvester*, *Jackson*, those cases,  
24 are the cases that should guide the Court's analysis. Indeed,  
25 I think they're very, very, very closely analogous to the



1 situation here.

2 You know, to get back to the standing issue, again, the  
3 plaintiffs are challenging a number of aspects of this law, and  
4 no named plaintiff has actually said that any of these  
5 requirements applied to them.

6 So the Federal Limits Apply license issue. No plaintiff  
7 has said that they have a Federal Limits Apply license.

8 The rejection issue. No plaintiff has said that they've  
9 had a transaction rejected.

10 **THE COURT:** You know, I -- I asked you about  
11 face-to-face, and you told me that it was to verify that it's  
12 the person that's on the ID, but couldn't -- couldn't --  
13 couldn't that be done through -- I mean, a lot of what you have  
14 told me today is basically dependent upon online services, for  
15 example, going to the California Firearms Application Reporting  
16 System, which requires a certain amount of technology to be  
17 used; right?

18 Although I'm a dinosaur, I know that technology is -- you  
19 know, is progressing. And, in fact, at this point in time, I  
20 can talk to a relative halfway around the world on something  
21 called Skype; right? Or I can talk to someone on FaceTime. So  
22 why wouldn't you be able to do that?

23 I mean, why not include something like that rather than --  
24 because -- and the reason why I mention that is because this  
25 face-to-face requirement necessarily requires that someone be

1 in the State of California, dealing with a State of California  
2 vendor in order to be able to purchase the ammunition as  
3 opposed to, say, someone being in Colorado, buying the  
4 ammunition in Colorado, and being able to do, say, the Skype  
5 or -- or FaceTime to confirm that the person who's buying  
6 the -- the ammunition is, in fact, the person that's on the ID.

7 **MR. RICHARDS:** Well, Your Honor, I think we're veering  
8 to the dormant commerce clause issue there, but --

9 **THE COURT:** Well, I did -- I did sort of try to sneak  
10 one on you there for a minute, but --

11 **MR. RICHARDS:** But to answer that question -- I mean,  
12 I think there are a whole lot of reasons why you wouldn't want  
13 to do that. I mean, one, a face-to-face requirement still is  
14 better than -- than a videoconferencing requirement, again, for  
15 purposes of identifying straw purchasers, for confirming that,  
16 you know, the person there is the actual person with the ID.

17 And I think face-to-face requirements -- they're not that  
18 uncommon. There's a whole number of products that, if you look  
19 through the case law, you can see face-to-face requirements  
20 imposed by the law.

21 I think there's a case out there on horse bedding, a case  
22 out there on fireworks, cigarettes, which is cited in the -- in  
23 the New York District Court case upholding New York's  
24 face-to-face ammunition sales requirement.

25 So there's a number of scenarios where face-to-face

1 requirements are imposed. I believe alcohol is another one.  
2 We wouldn't want people to be able to Skype with their local  
3 convenience store and say, "Hey, you know, I'm 21. Here's an  
4 ID. You know, send me some alcohol to my house." I mean --

5 **THE COURT:** No, no, no, but I guess -- I guess maybe  
6 I'm not understanding this, but if I'm in Colorado and -- well,  
7 I was just in Las Vegas. So -- so I go to Cabela's. I go to  
8 Cabela's, and I buy -- you know, I want to buy a box of  
9 12-gauge shotgun shells; right?

10 I show that person my ID and -- whatever the ID may be,  
11 and they look at me; right? And then they can contact the  
12 person that I guess they're going to have to ship the 20-gauge  
13 shotgun shells to in California for me to go pick them up in  
14 California.

15 The way I understand the law now, I would actually have to  
16 go physically and pick up those shells from the person that is  
17 delivering them to me in California; right?

18 **MR. RICHARDS:** That's correct.

19 **THE COURT:** Because they want to make sure that I'm  
20 the one who's buying the shells.

21 But if -- but if, in fact, they send -- from Cabela's,  
22 they send a Skype or a FaceTime picture of me to that vendor in  
23 California, what's wrong with that?

24 **MR. RICHARDS:** I might misunderstand Your Honor's  
25 hypothetical here. There's no requirement under California law

1 that if you're buying ammunition from Cabela's in Nevada --  
2 that you do that in person. It's only when you come pick up  
3 the ammunition in California, when it's being delivered to you  
4 in California, that you have to appear in person for that  
5 background check.

6 So there's no requirement to get -- the law does not  
7 regulate extraterritorially, and I think we briefed that fairly  
8 well in our motion to dismiss, and I didn't understand the  
9 Court's ruling on that motion to hold that the law does  
10 regulate extra -- extraterritorially in violation of cases like  
11 *Saint Francis* and that line of authority.

12 So --

13 **THE COURT:** Well, maybe I can buy you a beer later on  
14 this afternoon, and I'll try to explain it to you.

15 (Laughter)

16 **MR. RICHARDS:** Okay. Well, again, I may have mis- --  
17 misunderstood that.

18 But, again, the law -- the law -- the law is clear in the  
19 Ninth Circuit that someone who's sending a product into  
20 California can be subject to regulation without that being a  
21 per se invalid extraterritorial regulation of interstate  
22 commerce.

23 You know, there's a lot of issues on the Second Amendment  
24 that I'd like to get back to, but I'm happy to keep going on  
25 the dormant commerce clause, if you'd -- if you'd like.

1           **THE COURT:** No. It's your -- it's your --

2           **MR. RICHARDS:** Okay. Well --

3           **THE COURT:** You spend it however you want.

4           **MR. RICHARDS:** I'll just -- I'll just tie a knot up on  
5 this dormant commerce clause issue. And, again, in our moving  
6 papers, we asked the Court to take a second look at the -- at  
7 the Ninth Circuit's decision -- I apologize -- the *National*  
8 *Biweekly* decision.

9           In that case, the Ninth Circuit held that the law at issue  
10 violated the dormant commerce clause because it required  
11 mortgage -- or loan proraters -- that's people who process  
12 payments from a mortgagee and send them off to a creditor. It  
13 required those proraters to incorporate in California, and it  
14 deemed that requirement a residency requirement, which makes  
15 sense because a corporation's residency is determined both by  
16 its domicile and its place of incorporation. Corporations have  
17 two -- two residences for legal purposes.

18           It also, among other things, require -- would mean that  
19 those corporations would be subject to the California rules  
20 governing corporate internal affairs as opposed to Delaware or  
21 whatever other corporate internal operating rules would govern  
22 if the state -- if the corporation had been incorporated in a  
23 different state.

24           So that's quite a -- that's quite a bit different than  
25 prohibiting face-to-face transactions. It's not, as the

1 plaintiffs have argued, a residency requirement. Indeed, we  
2 know this because several of the most prominent vendors of  
3 ammunition are, in fact, out-of-state businesses, Wal-Mart, for  
4 example, Dick's, for example.

5 So this is not a requirement that forces -- that forces  
6 residency, and --

7 **THE COURT:** What about the not-so-big dealers like the  
8 mom-and-pop's ammo store down the street? What about them?  
9 Kind of puts them at a bit of a disadvantage, doesn't it?

10 **MR. RICHARDS:** It very well -- very well may, but  
11 that's not the -- that's not the analysis for dormant commerce  
12 clause purposes. The analysis for dormant commerce clause  
13 purposes is whether it -- it regulates unevenly in interstate  
14 commerce and -- and --

15 **THE COURT:** Well, you just told me that basically  
16 those big companies like Wal-Mart and so on -- they have an  
17 advantage; right? It regulates unevenly because they have an  
18 advantage. The mom-and-pop store doesn't have that advantage.  
19 They're just a mom-and-pop store.

20 **MR. RICHARDS:** Again, that's not -- that's not -- the  
21 advantage is not determined by their state of residency.  
22 That's determined by how large they are.

23 I think the *Exxon* case is a good example of courts holding  
24 that the economic effects on an individual business are not  
25 what governs the dormant commerce clause analysis. It's

1 whether the law regulates evenhandedly, and California's law  
2 does regulate evenhandedly.

3 It says that you have to have a brick-and-mortar location  
4 where you can do face-to-face transactions when you sell ammo,  
5 and that applies to instate real -- or instate businesses and  
6 out-of-state businesses.

7 And that's -- and on that front, I was -- actually, just  
8 this weekend, I became aware of a case called *Wal-Mart Stores,*  
9 *Incorporated v. Texas Alcoholic Beverage Commission* that the  
10 Fifth Circuit issued on August 15th, and I think --

11 **THE COURT:** You want to do that again? That was  
12 pretty fast.

13 **MR. RICHARDS:** Yeah, sure.

14 It's *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage*  
15 *Commission*. That was published -- issued by the Fifth Circuit  
16 on August 15th. It's Case No. 18-50299.

17 Now, I won't get too far into it since it wasn't briefed,  
18 but I would just direct the Court to look at Pages 16 really  
19 through the conclusion, where the analysis is pretty much on  
20 all fours with the arguments that we've been making about the  
21 dormant clause -- commerce clause in this case.

22 Just -- and I'll leave it at that unless the Court would  
23 like me to discuss the facts of it, but I think all the -- all  
24 the analysis there is doing is just confirming the analysis  
25 that we have been moving for in this case.

1           **THE COURT:** Okay.

2           **MR. RICHARDS:** To come back to the Second Amendment  
3 issues, I do want to get back to this facial challenge issue  
4 because it is -- like I said earlier this morning, it's a  
5 significant issue, and --

6           **THE COURT:** It must be. You've only raised it now  
7 about 25 times.

8                                 (Laughter)

9           **MR. RICHARDS:** But there's -- there's a lot -- there's  
10 a lot of discussion on that. And, you know, I think at the  
11 starting point here, the plaintiffs' sort of downplaying of  
12 *Salerno* is -- is pretty amazing because we have a Supreme Court  
13 case that's held that this is the standard, and no case [sic]  
14 has overturned that case, and they're saying it doesn't apply.

15           Their -- as the Supreme Court noted in the *Washington*  
16 *State Grange* case, some Justices have criticized that standard,  
17 but it's never been overruled. Indeed, the Ninth Circuit has  
18 said that's the governing standard. In one case, it said,  
19 "*Salerno* remains binding law on the Ninth Circuit, and we are  
20 not free to ignore it." That's a 2016 case called *Arizona v.*  
21 *Arpaio*, and that's at --

22           **THE COURT:** I'm not -- I'm not free to ignore it,  
23 either; right?

24           **MR. RICHARDS:** Yeah. That's -- that is -- that's  
25 right. I'll just finish the cite there, 821 F.3d, 1098.



1 And, again, *Salerno* is going to apply in the Second  
2 Amendment context as well. The Ninth Circuit hasn't done it  
3 because I don't believe the issue has come up, but the Eleventh  
4 Circuit has done it in a case called *GeorgiaCarry.org v.*  
5 *Georgia*. That's 687 F.3d, 1244.

6 There, the Court said --

7 **THE COURT:** Is that in your brief?

8 **MR. RICHARDS:** It is not, but this is in response to  
9 the arguments raised in the plaintiffs' reply brief about  
10 whether *Salerno* applies.

11 **THE COURT:** Okay.

12 **MR. RICHARDS:** And just to cap this off, the Court can  
13 take a look at that case, where the Court -- the Eleventh  
14 Circuit applied *Salerno*.

15 I'd also direct the Court to the Eleventh Circuit's en  
16 banc decision in *United States v. Skoien*, which was written by  
17 Judge Easterbrook, where the Court said a person to whom a  
18 statute properly applies can obtain relief on arguments that a  
19 differently situated person might present. That's exactly  
20 what's happening here. The plaintiffs in this case have not  
21 said that the statute applies to them in the ways that they are  
22 complaining of.

23 Now, plaintiffs have also suggested that CRPA may have  
24 associational standing, but the facts that they rely on to  
25 establish that standing are both inadequate and not alleged in

1 any pleading. As the cases we cited in our briefing papers  
2 said, the facts establishing standing have to be alleged in the  
3 complaint.

4 Plaintiffs could have filed a supplemental complaint, but  
5 they didn't. They're relying on a declaration that is itself  
6 deficient, but that -- that's a problem, and the second problem  
7 is that the allegations are just threadbare recitals of "We are  
8 aware of some members who've experienced this." That's not  
9 enough to establish associational standing.

10 On the substance of the associational standing test, they  
11 also have to show that the participation of those members isn't  
12 necessary to the case. And here, for reasons we discussed  
13 earlier, it most certainly is.

14 If someone is rejected when they go in for a standard  
15 ammunition eligibility check, there can be any number of  
16 reasons why they may have been rejected, and determining what  
17 those are is going to help the Court analyze whether there's an  
18 issue or not, a constitutional issue or not.

19 So the participation of -- of members is going to -- is  
20 going to be necessary at least to understand what the group of  
21 people might have to do or go through. So the associational  
22 standing is not a sufficient basis for this -- for this to go  
23 forward.

24 I'd also say that even under the lesser standard -- so  
25 *Salerno* is a very high standard. We all acknowledge that. But

1 even under the lesser standard, it's still an extremely  
2 demanding standard that plaintiffs can't meet. The plainly  
3 legitimate sweep test that the Court in -- the Supreme Court in  
4 *Washington State Grange* applied is still a very, very high  
5 standard.

6 And, again, here, in this case, we have no plaintiff who  
7 said that they haven't been able to purchase ammunition, no  
8 plaintiff who's alleged that they've been seriously denied --  
9 delayed. We have hypotheticals and -- and speculation about  
10 how the law may work or may be working.

11 We don't know, again, for example, whether the people who  
12 were rejected under the law have been unable to acquire  
13 ammunition. We just know that they weren't able to use one  
14 avenue to obtain it. So the standard's still quite high.

15 The -- it's undisputed that at least 80 percent of the  
16 transactions for standard ammunition eligibility checks have  
17 been processed and approved. The numbers for basic ammunition  
18 eligibility checks and COE checks are in keeping -- if not  
19 better, I believe, for basic, the approval rate is -- is quite  
20 high.

21 So what we have here is just a theoretical issue that  
22 can't be the basis for providing -- or entering a preliminary  
23 injunction against the State. What we do know is that the law  
24 is requiring people to wait on average five, maybe eight or ten  
25 minutes and pay a small fee.

1 And for other people, they may have to wait a little bit  
2 longer. If they have a criminal background check or background  
3 history -- criminal history, they may need to wait a little bit  
4 longer, but all these things are in keeping with the same rules  
5 that apply to firearms.

6 I think we've covered the application of the intermediate  
7 scrutiny standard here pretty well. Again --

8 **THE COURT:** You know -- but I'm still -- I'm having a  
9 hard time dealing with this.

10 I go out, and I buy a firearm. They do a background check  
11 on me. I get the firearm. Then I become -- let's see. Let me  
12 see if I can figure this out.

13 So I am a legal resident in the United States. My  
14 understanding is that I can, in fact, buy and possess firearms  
15 and ammunition.

16 Is that your understanding?

17 **MR. RICHARDS:** Yes, if you're not otherwise  
18 prohibited.

19 **THE COURT:** Right.

20 So -- but if -- but if somehow -- so I go out, and I buy  
21 my weapon, which I can buy legally, but then my legal status is  
22 revoked for whatever reason.

23 I still have my firearm; right? But now I am here  
24 illegally. My -- I have an unlawful -- unlawful presence;  
25 right? But I still have my firearm; right? And until, in

1 fact, I am deported and removed from the country, I have that  
2 firearm. That could be a year, two years, three years, 20  
3 years; right?

4 And so I'm having a hard time understanding the State's --  
5 the State's interest in making sure that every time that  
6 someone goes to buy some ammunition, notwithstanding the fact  
7 that they have no criminal history, notwithstanding the fact  
8 that they are not here illegally, that every time that they're  
9 going to go buy ammunition, they have to go through this  
10 process.

11 If I can own that gun that I owned -- originally purchased  
12 when I had legal status but then now I am a prohibited person  
13 because my status has been revoked, I still have that gun;  
14 right? What's the difference between that and somebody who  
15 goes out and buys ammunition today and buys ammunition tomorrow  
16 and buys ammunition the next day and a year from now and two  
17 years from now, and the only possible thing that can happen is  
18 that sometime between that period of time -- say they -- you  
19 issue them a year permit -- that somewhere during that year  
20 permit period, they become a prohibited person; right?

21 Just like the guy that went out and bought the gun and  
22 then became an unlawful alien, same -- same situation, isn't  
23 it?

24 **MR. RICHARDS:** Yeah, similar, but let me be clear  
25 about something.

1           If you -- if you were a lawful firearm-owner and you  
2       become a prohibited person for whatever reason -- you lose your  
3       lawful status in the United States, you become a felon, what  
4       have you -- you're on that armed prohibited persons list, and  
5       you may find law enforcement coming to your house to take your  
6       firearm away.

7           That's why that list exists. The armed prohibited persons  
8       list is designed to take guns away from people who lawfully  
9       possessed them at one point and has since become prohibited.

10          And Your Honor can go on the Bureau's website and look at  
11       annual reports that the Department of Justice prepares that  
12       talks about how that law is implemented. I believe they  
13       describe in detail how they go out and take guns away from  
14       prohibited people, including violent felons.

15          So that's something that definitely happens.

16               **THE COURT:** All right.

17               **MR. RICHARDS:** And to answer your question about  
18       "Well, why not a year" -- "why not a year permit?" and so on,  
19       people become prohibited. As I mentioned earlier, about 11,000  
20       people a year end up on that list, and the --

21               **THE COURT:** Right. That was -- that was the point of  
22       my question.

23          So -- so the point is that if you become a prohibited  
24       person after you purchase that firearm, law enforcement will  
25       come knocking on your door; right?

1 And if you become a prohibited person after you bought  
2 ammunition last week, you're now a prohibited person this week.  
3 So they don't show up, and so you won't be able to buy the  
4 ammunition; right?

5 **MR. RICHARDS:** That's correct.

6 **THE COURT:** Okay. I gotcha.

7 **MR. RICHARDS:** And, again, the -- and just to go back  
8 to this "Why can't you have a year-long permit?" there's the  
9 reason that we just discussed, but the -- the burden for the  
10 person who has the AFS entry, owns the firearm, is going to be  
11 most people who purchase firearms, you know, after 2014 -- is  
12 going to be fairly insignificant.

13 You go in, you do the transaction, you wait a few minutes,  
14 and you pay a dollar. This is -- it's a very small burden. I  
15 mean, it's not --

16 **THE COURT:** Yeah, if you're already in the AFS system.

17 **MR. RICHARDS:** That's correct, yes. And if you're  
18 not, there's a way to get in there.

19 So there may be some longer-than-ideal delays in the  
20 front-end application of this law, but those things are things  
21 that can be addressed. And going forward, most people will be  
22 able to correct those -- ideally, all people would be -- and  
23 they'll be able to use that same process that everyone else can  
24 use.

25 It's, again, fairly short and hopefully will be faster and

1 more efficient as the learning curve of the new law kicks in  
2 and people -- people see how it operates.

3 **THE COURT:** So let me ask you this.

4 If you're on the AFS system because you bought a 12-gauge  
5 shotgun or whatever, does the law allow you to buy a  
6 .45-caliber Longbow -- Long Colt?

7 **MR. RICHARDS:** Yes.

8 **THE COURT:** So once you're in the system, the AFS  
9 system, you can buy any ammunition you want?

10 **MR. RICHARDS:** That's correct.

11 **THE COURT:** Okay.

12 **MR. RICHARDS:** And that is, again, for the same  
13 reasons we were talking about earlier. If you clear -- you  
14 clear the background check at the time you purchase that -- the  
15 firearm and you're undergoing a sort of mini-background check  
16 every time you go buy that ammunition to make sure you haven't  
17 become a prohibited person because your prohibited status --  
18 you don't end up on the APPS list because you have your .45,  
19 your 1911 --

20 **THE COURT:** Right.

21 **MR. RICHARDS:** -- versus your 12-gauge shotgun. You  
22 end up on the prohibited persons list because you commit a  
23 felony or you've had a mental health hold or one or the other  
24 events that would -- that would lead to that.

25 So it covers the range, and it does reflect that people



1 may not want -- people who have older guns may not want all  
2 their guns in the system. They can -- they can just have one  
3 entered.

4 So if you have a large collection of long guns and  
5 handguns, you can submit the report for one of them and have  
6 that be your sort of AFS entry, the basis for your AFS entry,  
7 and buy ammunition for all your other guns using that.

8 **THE COURT:** Okay.

9 **MR. RICHARDS:** And I'll just close by emphasizing  
10 something that we've -- that I think we haven't talked directly  
11 about here a whole lot today. We focused more on the  
12 intermediate scrutiny analysis and facial challenges and  
13 whatnot.

14 But we are here today with the plaintiffs requesting the  
15 extraordinary relief of a preliminary injunction, and it's not  
16 just likelihood of success on the merits that controls that  
17 analysis.

18 Even if they could establish likelihood of success on the  
19 merits and the corresponding irreparable harm, which they  
20 can't -- but even if they could, the public interest and  
21 balance of the equity factors here still weigh strongly  
22 against -- indeed, dispositively against -- issuing a  
23 preliminary injunction.

24 The State has provided evidence that shows that over a  
25 hundred prohibited persons have been stopped from buying

1 ammunition since the law went into effect. That number is  
2 growing daily. I checked them last week. I believe it's now  
3 up to about 170 or so, and it's going to keep going up, more  
4 and more prohibited people, as this law is in effect.

5 If this law is enjoined, those people, people like them,  
6 and the other larger group of people who are deterred from  
7 purchasing ammunition because they're prohibited persons will  
8 be able to buy ammunition with impunity and use that ammunition  
9 in crimes and other socially undesirable ways.

10 And that, I think, is dispositive here when you weigh it  
11 against the countervailing considerations that the plaintiffs  
12 have raised of a relatively short wait -- and, indeed, no one  
13 saying that they have not been able to obtain or purchase or  
14 use ammunition for self-defense or any other lawful purpose.

15 So I think we win on the likelihood of success on the  
16 merits, we win on the irreparable harm, but we especially win  
17 on the balance of the equities and the public interest because  
18 dangerous people will get ammunition that they otherwise  
19 wouldn't have been able to get if this law is enjoined.

20 And on that analysis, I would just direct the Court to the  
21 *Tracy Rifle* decision. It's an Eastern District of California  
22 decision where the Court denied preliminary injunction  
23 employing this type of reasoning. We cite that case in our  
24 brief. But, again, I think that is an extremely important  
25 aspect of what plaintiffs are asking for here.

1           So with that, we'd ask that the Court deny the plaintiffs'  
2 motion for preliminary injunction. Thank you.

3           **THE COURT:** All right. Mr. Brady, any response?

4           **MR. BRADY:** Thank you, Your Honor. I'll try to make  
5 this quick because I know we've been here for a while and  
6 there's a lot of content to cover.

7           **THE COURT:** That's all right. It's important. I'm  
8 willing to give it the time.

9           So take your time.

10          **MR. BRADY:** So Mr. Richards says that there's  
11 speculation on why people -- why these 11,000 individuals were  
12 denied or delayed or whatever the terminology is or were  
13 refused ammunition initially, and he's right. We do have to  
14 speculate because we're not the State.

15          The State should know this. The State has the burden to  
16 show whether these people were denied permanently, were denied  
17 for cause, what remedy they can go about to fix that issue, and  
18 the State --

19          **THE COURT:** You know, I'm really concerned about the  
20 fact that people aren't told why they're being denied -- at the  
21 time they're told they're being denied. I don't understand  
22 that. That doesn't seem to make any sense to me.

23          **MR. BRADY:** Well, in addition to that, Your Honor, the  
24 State is the one speculating that it's not that big of a  
25 burden.

1           **THE COURT:** I heard you. I heard you. I understand.

2           **MR. BRADY:** And I just think one piece of evidence  
3 that is the State's evidence that is -- goes to show that this  
4 is not just some -- a few people are having problems and being  
5 able to fix it.

6           It is -- is -- you know, Mr. Richards is correct that we  
7 don't know how many of those 11,000 people that were rejected  
8 have no AFS record. We don't know that. They could have been  
9 people going up and they were denied because they didn't have  
10 that AFS record, but we do know that one in eight COE-holders  
11 is denied, based on the State's own evidence.

12           The COE-holder, to be clear, is essentially the system  
13 Your Honor was asking about where someone has a permit that  
14 says, "I am eligible." They are -- on a daily basis, on a  
15 regular basis, the State is doing on those individuals what's  
16 called a --

17           **THE COURT:** Yeah, but could that be because they've  
18 become prohibited persons between the time that they got their  
19 COE and the time that they did the check?

20           **MR. BRADY:** One in eight COE-holders, people who went  
21 out of their way to apply with the State, do fingerprint  
22 checks --

23           **THE COURT:** So you don't know?

24           **MR. BRADY:** I do not know, but I would -- I would  
25 be -- like Your Honor --

1           **THE COURT:** The State knows.

2           **MR. BRADY:** -- I would eat my tie, like Your Honor  
3 wrote, if one in eight COE-holders becomes a prohibited person.  
4 It's more of -- it is attributed to this clunky system that  
5 does not know how to adapt to different situations and say,  
6 "Oh, this is a COE-holder. Why don't we just look at his COE  
7 number and see if he or she is rejected."

8           They have to check for an AFS record. Oh, different  
9 address or different name or whatever problem, or they don't  
10 have a Federal Limits -- they don't have a real ID, even though  
11 they have a COE that tells us who this person is.

12           That in and of itself, I think, goes to show that this  
13 system -- that and the fact that nonresidents from --  
14 non-California residents have to get this COE is enough to  
15 scrap this system, and I think that it's crucial to  
16 understand --

17           **THE COURT:** But just because -- just because the  
18 system is perhaps ineffective or inefficient or difficult,  
19 that's not necessarily a basis for me to grant a preliminary  
20 injunction; right?

21           **MR. BRADY:** I think it is, Your Honor, when we're  
22 talking about the numbers of people and the undeterminability  
23 of the problems that is resulting in 11,000 people being  
24 denied.

25           **THE COURT:** You're saying that if the number of

1   rejections -- unacceptable rejections is so high as to make it  
2   essentially a farce, if you will, that the system is -- is  
3   impairing too many people's rights to purchase ammunition.  
4   Even though the system is designed as a system, it fails  
5   because it doesn't fit?

6           **MR. BRADY:** That's correct. It covers -- it burdens  
7   far too much constitutionally protected activity to justify the  
8   little, if any, good it does, according to the State.

9           I think, Your Honor -- I know you were playing devil's  
10   advocate in Your Honor's position with respect to the State,  
11   but we would never accept this in a voting context where people  
12   who need to be able to go vote have to show an ID and the State  
13   says, "No, not the ID we issued you. You have to show us  
14   supplemental ID."

15           And then the people who have that have to go through a  
16   background check process and then "Oh, sorry. 18 percent of  
17   you, almost one in five of you, are not going to be able to do  
18   that. You're going to have to go figure out this problem, even  
19   though it's our burden to tell you why you can't exercise your  
20   right."

21           We're talking about constitutional rights here. Is -- it  
22   is the Government's burden even as a gatekeeper; right? They  
23   can be a gatekeeper and confirm that people are -- are able to  
24   exercise their rights or punish those who are not entitled to  
25   exercise those rights after the fact.

1           What I don't think they can do under the fit portion of  
2 the heightened scrutiny analysis -- and I say "heightened  
3 scrutiny" because plaintiffs do not concede that intermediate  
4 scrutiny applies here, as we indicate in our papers. I'll get  
5 into that in a second. I think -- I believe strict scrutiny  
6 applies.

7           But even if intermediate scrutiny applies, under that  
8 second portion of the analysis under the fit, that's just far  
9 too much of a burden to impose on rights. It's just not -- it  
10 is the Government's burden to prove that it's necessary for  
11 them or that it's not -- that it is not sufficiently tailored.

12           So -- or that it is sufficient -- it is their burden to  
13 prove that it is sufficiently tailored, and they have not --  
14 they have not done that. They've just speculated that "Well,  
15 these people could probably fix their problems fairly easily,"  
16 but we do not know that. And it's their burden to show that  
17 they -- that that is indeed the case. And even if they could  
18 do that, I think that plaintiffs would still prevail because of  
19 the systemic problems with this.

20           Again, the idea that a non-California resident has to pay  
21 almost a hundred dollars in fees and undergo a process that  
22 takes about a month, according -- that the State conceded, to  
23 obtain a COE and know that ahead of time before coming here  
24 raises all kinds of problems, Second Amendment problems, for  
25 those individuals. It may entail plaintiffs having to amend

1 the complaint to raise equal protection challenges on them,  
2 potentially other challenges.

3 And remember, Your Honor, this all just happened. These  
4 were emergency regulations. These were -- plaintiffs did not  
5 know about a lot of -- about the ID requirements until just a  
6 few months ago, about two months, a month and a half, prior to  
7 July 1st that the law -- the date that the law was set to take  
8 effect.

9 The California --

10 **THE COURT:** You expect notice? You expect notice?

11 **MR. BRADY:** Not from the California Bureau of  
12 Firearms, not anymore. This is their standard operating  
13 procedure, Your Honor, and I don't mean to, you know, lack  
14 decorum here.

15 But frankly, based on my experience, it's getting quite  
16 frustrating to see, you know, time after time the California  
17 Department of Justice Bureau of Firearms puts out these  
18 regulations for laws that have been on the -- that have been  
19 passed years ago and say, "Okay. This law is going to take  
20 effect in two years from now. You all are going to implement  
21 the regulations," and then they roll out emergency regulations  
22 the month before or don't even bother rolling out regulations  
23 sometimes.

24 And it's really quite frustrating, and obviously that's  
25 not Mr. Richards' problem. But I think that it's worth taking



1 into consideration, when Mr. Richards is attacking the way in  
2 which we are bringing this motion and all the bases, to take  
3 into account we just were notified, you know, relatively  
4 recently of all of these problems.

5 Plaintiffs waited to see how this system would roll out.  
6 We waited to see how the ID requirement would take effect, how  
7 the background check process would work, and it's -- it has  
8 been very problematic for many people. And that's -- you know,  
9 all these variables -- the State says that these are reasons  
10 why this should be an as-applied challenge, you know, for each  
11 individual.

12 To the contrary, I think that those show exactly why, you  
13 know, a facial challenge is appropriate. You know, I don't  
14 even -- I don't even know how an as-applied challenge would  
15 work here, particularly with those individuals who are denied  
16 erroneously; right?

17 So those 11,000 folks who were denied -- maybe some of  
18 them might say, "Hey, it's just an address change. All you got  
19 to do is change my address on CFARS," and we'll get into --  
20 I'll explain in a minute why that's not just a simple  
21 log-on-and-change-their-address issue.

22 But, you know -- so these 11,000 people don't know they're  
23 denied or somebody doesn't know they're denied until they're  
24 denied. And then once they are denied, they're supposed to  
25 bring an as-applied challenge on their individual

1 circumstances? That's usually not the way it works in  
2 constitutional rights.

3 The injury here is that there's so many people being  
4 denied that an organization like the California Rifle and  
5 Pistol Association will represent their interest for all these  
6 variations of injury.

7 You know, that -- no one would suggest, I don't think,  
8 that the ACLU wouldn't be able to defend, you know, this law --  
9 would not have standing to attack this law if it applied to  
10 voter registration versus ammunition registration. I just  
11 don't think that that would even be a plausible argument.

12 I would also direct Your Honor to -- on this facial  
13 challenge issue to the case that we cite, this -- the  
14 plaintiffs cited this in our reply brief, *Chicago v. Morales*,  
15 527 U.S. 41, at 55, Footnote 22.

16 It -- it basically rejects the view that a plaintiff must  
17 establish that no set of circumstances exists under which the  
18 law would be valid to -- to bring a facial challenge, and I  
19 believe there's a concurrence in that opinion that questions  
20 whether even *Salerno* did that.

21 And so there is Supreme Court precedent to suggest that --  
22 that you don't have to have -- that either *Salerno* is being  
23 misread or that you don't have to adhere to this -- that a  
24 plaintiff must show that there's no set of circumstances under  
25 which the law would apply.

1           Otherwise, all the First Amendment cases that we always  
2     see, you know, wouldn't be able to be facial challenges. But  
3     courts look away and say if a significant number of people are  
4     being impacted, then plaintiffs have standing and -- or  
5     plaintiffs can bring a facial challenge.

6           And as to standing, the California Rifle and Pistol  
7     Association -- the complaint alleges that they are representing  
8     those members and supporters who are impacted by the burdens of  
9     this ammunition scheme.

10          We didn't know those -- what specific burdens those would  
11     be until July 1st, at which time the California Rifle and  
12     Pistol Association submitted a declaration by one Mr. Richard  
13     Travis in support of our motion that lays out that there are  
14     CRPA members with these very burdens.

15          So while it is true that none of the named individual  
16     plaintiffs have alleged that they have been barred of  
17     ammunition purchase or that they've been -- that they don't  
18     have the supplemental documentation, there are CRPA members who  
19     do, and I think this is a perfect example.

20          You know, the question is not whether anyone can clear the  
21     system. It's whether the State can require that everyone be  
22     subjected to a system like this that results in about  
23     18 percent of people being at least initially denied, that  
24     won't accept the very standard-issued ID that the State issues,  
25     and that results in a significant waiting period and burden,

1 and then we don't know how exactly to fix that problem yet.

2 And I think with all of that, there -- that shows that  
3 we're -- the plaintiffs are likely to succeed on the merits at  
4 least on the Second Amendment claim with respect to the  
5 background check system.

6 With respect to the commerce clause issue, I think  
7 Your Honor has heard both sides. I won't belabor the point.  
8 I'll take a look at the case that Mr. Richards pointed out, but  
9 I don't think his analysis is correct.

10 I think that -- that this statute forces presence in  
11 California -- and that's "presence" with a c-e, not with a  
12 t-s -- of these companies from out of state. It forces them to  
13 be present in California to -- physically present to be on the  
14 same playing field. I think that the case law --

15 **THE COURT:** I think -- I think that's what I was  
16 referring to when he referred to Wal-Mart and some of the  
17 bigger -- the bigger companies that have a presence in  
18 California. They may have a presence somewhere else, but they  
19 also have a presence in California.

20 That's not always true of -- I don't know -- for example,  
21 Sprague's in Yuma, Arizona. If they have a presence in  
22 California, I don't know.

23 **MR. BRADY:** Or -- or the plaintiff Able Ammo in this  
24 matter.

25 **THE COURT:** Yeah.

1           **MR. BRADY:** Able Ammo would have to open a storefront  
2 in California to be on an equal footing. So that's the -- the  
3 commerce clause.

4           With respect --

5           **THE COURT:** I hate to cut you off, but I do have a  
6 criminal calendar that I still have to get to. So I'll give  
7 you five more minutes, and then --

8           **MR. BRADY:** I think I can be less than that,  
9 Your Honor.

10          **THE COURT:** Okay.

11          **MR. BRADY:** Okay. So with respect to the scrutiny,  
12 like I said, plaintiffs don't accept that intermediate scrutiny  
13 applies. We're talking about a barrier to the access of your  
14 constitutional right to acquire ammunition.

15          The other cases that -- that Mr. Richards pointed to --  
16 *Silvester*, *Pena*, *Jackson* -- none of those resulted in a ban on  
17 the people's rights to acquire ammunition. *Silvester* was a  
18 waiting period. *Pena* was a restriction on types of handguns.  
19 *Jackson* was a restriction on types of ammunition and itself  
20 said that ammunition is protected. Here, we're talking about  
21 if you cannot meet the State's system here, you are barred from  
22 exercising your right.

23          So not only do I think that triggers strict scrutiny  
24 because it is a substantial burden on the core of the right to  
25 even have the implements, the arms, to exercise the right, but

1 I think it also goes to counter Mr. Richards' claim that  
2 plaintiffs do not address -- why they didn't address these  
3 cases, that they're so similar. I do not think they're similar  
4 at all. This is a whole other level of burden.

5 And I think with respect to the fit analysis, whether  
6 you're talking about strict or intermediate scrutiny, at the  
7 end of the day, we -- I do not think that the State can meet  
8 its burden.

9 And once you say that there are -- that there is a  
10 likelihood to succeed on the merits here, that -- then there's  
11 necessarily irreparable harm because these people are being  
12 deprived of their -- their constitutional rights.

13 And to the point about the balancing of the hardships, all  
14 the State has to do is do nothing, and all it has to do is go  
15 back to the status quo, to two years ago, that the rest of the  
16 entire country is in currently.

17 **THE COURT:** What's that?

18 **MR. BRADY:** That is no background check system  
19 until -- unless and until they can figure out the bugs, in  
20 which case, we'll -- we can reconvene on that. But with this  
21 system, all plaintiffs are asking for is returning to the  
22 status quo which is shared by literally every state in the  
23 country.

24 And so to claim that this is necessary or, you know, the  
25 Republic is going to crumble is simply not the case. The

1 Republic has rejected -- or has not adopted these laws.

2 So with -- unless Your Honor has any questions, I will  
3 submit.

4 **THE COURT:** All right. Well, thank you.

5 **MR. RICHARDS:** Your Honor --

6 **THE COURT:** Yeah. Go ahead.

7 **MR. RICHARDS:** -- might I just have one more minute to  
8 make two brief points in response to something that came up --

9 **THE COURT:** Sure. Sure. Sure.

10 **MR. RICHARDS:** -- because I think it's important.

11 **THE COURT:** Sure.

12 **MR. RICHARDS:** And I'll be very brief on it.

13 First, on the COE background checks and the rejections  
14 there, there could be any number of reasons why those would be  
15 rejected, including that the COE has lapsed. That is, someone  
16 comes in with a COE they got three years ago. They haven't  
17 renewed it.

18 So I don't think that that -- as Mr. Brady was suggesting,  
19 that that is a good metric for determining, you know,  
20 rejections. And, again, I think the fallback here is everyone  
21 can use the basic ammunition eligibility check, and they have  
22 cited no one who's gone through that that's been prevented from  
23 getting ammunition.

24 The second point -- and with regard to the identification  
25 regulations --

1           **THE COURT:** So -- I'm sorry. I hate to do this to  
2 you, but if you get that basic ammunition check -- right? You  
3 get that done.

4           Now, the next time you want to buy ammunition because  
5 maybe you're, like, you know, someone who is on the Olympic  
6 team and fires -- shoots 500 rounds a month -- next time she's  
7 going to go buy ammunition, all she has to do is do what? Go  
8 through the AFS? Pay a buck?

9           Is that right?

10          **MR. RICHARDS:** Yes. If you have a gun in the AFS, you  
11 would just go through the -- through the --

12          **THE COURT:** No, but if --

13          **MR. BRADY:** No. That's not what -- Your Honor, to --  
14 if I may.

15          **THE COURT:** Yeah.

16          **MR. BRADY:** If you go through the basic background  
17 check and you do not have a firearm in AFS and you never put a  
18 firearm in AFS, you have to go through the basic background  
19 check, pay the 19-dollar fee, and wait the hours to days every  
20 single time --

21          **THE COURT:** Every single time?

22          **MR. BRADY:** And for the record, it's more like 1500  
23 rounds a day for Ms. Rhode when she's training.

24          **MR. RICHARDS:** And, Your Honor, just to be --

25          **THE COURT:** I'm not going to quibble with you about



1 500 or 1500 rounds.

2 (Laughter)

3 **MR. BRADY:** I was joking.

4 **MR. RICHARDS:** Yet Ms. Rhode is not here, and she's  
5 not complained that this has happened. And more importantly,  
6 in a situation like one you're talking about, the person,  
7 Ms. Rhode, or anyone else --

8 **THE COURT:** I was just using that as a --

9 **MR. RICHARDS:** Sure. I understand.

10 **THE COURT:** -- hypothetical, Counsel.

11 **MR. RICHARDS:** They can submit the -- you know, can  
12 submit their firearm for inclusion in AFS and have that  
13 resolved, again, in a reasonable amount of time until it's  
14 resolved.

15 **THE COURT:** Right.

16 So what she has to do is she has to essentially tell the  
17 State, "I own a firearm" --

18 **MR. RICHARDS:** Yes.

19 **THE COURT:** -- and go through the background check;  
20 and thereafter, all she has to do is go through the AFS.

21 But if she does order ammunition from out of state, it  
22 does have to come to a California vendor, who charges a fee,  
23 and she has to be present in front of that ammunition vendor in  
24 order to pick up her 1500 rounds; right?

25 **MR. RICHARDS:** That is correct, just like anyone else.

1           **THE COURT:** Okay.

2           **MR. RICHARDS:** And the final thing I want to talk  
3 about is the regulations because Mr. Brady made some points  
4 about the way that they were promulgated which I think need to  
5 be responded to.

6           **THE COURT:** Okay.

7           **MR. RICHARDS:** As the California Department of  
8 Justice, the Bureau of Firearms followed the California  
9 Administrative Procedure Act when it promulgated those  
10 regulations. So if they have a problem with how those  
11 regulations were enacted, there's a procedure to address that.  
12 They were -- Mr. Brady's --

13           **THE COURT:** Is it controlled by the State?

14           **MR. RICHARDS:** Well, it's the -- the Office of  
15 Administrative Law and the state court system, yes.

16           **THE COURT:** Okay.

17           **MR. RICHARDS:** And finally, with regard to the ID  
18 regulation, it was consistent with the recommendations that  
19 both the NRA and ATF made to firearms vendors. They suggested  
20 that those vendors take a look at additional sources of  
21 identification in situations where they get Federal Limits  
22 Apply ID's presented to them.

23           Now, they didn't say in all situations, and they didn't  
24 say all the time. But nonetheless, the State thought that,  
25 given the confusion that Mr. Brady's firm had identified in

1 various correspondence with the State, that this -- these  
2 recommendations from both the ATF and NRA -- that this was an  
3 appropriate solution.

4 So with that, I would submit.

5 **MR. BRADY:** Our office brought those to the attention  
6 of the DOJ to warn dealers that if they did not take that  
7 precaution, they may be subject to criminal or -- penalties by  
8 the State. That's -- we did it not to say this is a good  
9 policy. It is to protect themselves from prosecution.

10 **THE COURT:** Well, listen, I've enjoyed -- I hope  
11 you've appreciated that from time to time, I smiled when I've  
12 chided you or -- or teased you a bit, but it's a serious  
13 subject.

14 I mean, look, I take, you know, the Second Amendment --  
15 somebody -- I read someone who once said that the Second  
16 Amendment is the Rodney Dangerfield of the Bill of Rights. I  
17 can't remember who wrote that. Sometimes, it certainly seems  
18 that way to me.

19 I don't remember anything in the Federalist Papers or  
20 anywhere else or the drafters of the Constitution or the Bill  
21 of Rights saying that the Second Amendment was going to be a  
22 stepchild or -- or a -- the Rodney Dangerfield of the Bill of  
23 Rights.

24 It's just as important as the First Amendment, the Fourth  
25 Amendment, the Eighth Amendment, and we should give it the same

1 consideration. And that's just, I think, the way it's supposed  
2 to be.

3 I appreciate you both, your arguments, your briefing.  
4 It's obvious you all get paid by the pound, and I appreciate  
5 it. I appreciate your being here.

6 I do have one -- one thing that's bothering me, and that  
7 is this. This system is so new that it's hard to really make a  
8 decision or determination that the system is a de facto ban by  
9 virtue of the way it has been structured because it is so new.  
10 It really only has one month in effect, as I understand it.

11 So what I'm going to do is I'm going to take this matter  
12 under submission, but I'm going to think about it. What I'd  
13 like for you to do is I'd like for the State to deliver to  
14 Mr. Brady the documents showing the 11,000 applications that  
15 were rejected.

16 Obviously, please redact any personal information, and I'd  
17 like to know why they were rejected -- okay? -- and whether or  
18 not -- if the State knows, whether or not the people that were  
19 rejected have since reapplied and have been allowed to -- to go  
20 ahead and purchase the ammunition.

21 I'd also like to know about the 106 because I think we've  
22 all agreed that the 106 -- there may be some that were  
23 considered to be prohibited persons who really aren't  
24 prohibited persons, and I would like to do that for the July  
25 group.

1 And I think -- I'm probably going to hold off on -- it may  
2 not make the plaintiff very happy, but I'm inclined to hold off  
3 for 30 days, maybe even 60, to make a decision to see if this  
4 system gets to working any better, if it needs to work better,  
5 and I'm not prejudging it.

6 But I'd like the same information to be provided for  
7 August as well, whatever applications are rejected, and the  
8 same thing for the prohibited -- for the prohibited users.  
9 That will give me some idea. Is this system improving? Is it  
10 getting better? Is it fixable? And that may factor into my  
11 ultimate decision.

12 Okay. It may be that I call you back. I've enjoyed  
13 having you both here, and you've taken my punishment with a  
14 smile. So I may ask you to come back sometime later on. I may  
15 not need you once I see -- if the plaintiff -- if Mr. Brady  
16 sees that the information that has been provided to him helps  
17 his -- his case, I'm sure that he will file something in the  
18 meantime to alert me to it.

19 And, Mr. Richards, if you see that, in fact, the  
20 information assists your side, you will obviously file  
21 something to help me along those lines as well. Okay?

22 **MR. RICHARDS:** Yes, Your Honor.

23 And I just wanted to say something for the Court here --

24 **THE COURT:** Sure.

25 **MR. RICHARDS:** -- just so you don't have unreasonable

1 expectations.

2 This system -- this -- this -- the database the State uses  
3 to run these background checks -- we can pull some information  
4 from it, but it's not a discovery-spitting machine. It's a law  
5 enforcement machine.

6 And so while it might be nice -- and theoretically, when  
7 we think of certain data that we'd like, I'm not sure -- I  
8 can't promise that we'll be able to get all data from it now,  
9 but we'll obviously discuss that later if that's the case.

10 **THE COURT:** Okay.

11 **MR. RICHARDS:** But I just want to say there are  
12 limitations on what can -- what can be pulled. I'll discuss  
13 them with Mr. Brady, and we can talk about them in a future --

14 **THE COURT:** Exercise your best efforts.

15 **MR. RICHARDS:** We will, Your Honor.

16 **THE COURT:** That's all I can expect.

17 **MR. RICHARDS:** We will.

18 **THE COURT:** Counsel, listen, I thank you very much. I  
19 appreciate it. I enjoyed having you here, and I wish you a  
20 good trip home. Okay?

21 **MR. RICHARDS:** Thank you, Your Honor.

22 **MR. BRADY:** Thank you, Your Honor.

23 **THE COURT:** All right. I'm going to take a brief  
24 recess for my staff. I'll be back in ten minutes, and then  
25 we'll pick up the criminal calendar.

1           Okay. Thank you.

2                           (Proceedings adjourned at 2:44 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, August 28, 2019

/S/ James C. Pence-Aviles

James C. Pence-Aviles, RMR, CRR, CSR No. 13059  
U.S. Court Reporter



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**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 MATTHEW D.  
CUBEIRO IN SUPPORT OF  
PLAINTIFFS' REPLY TO  
DEFENDANTS' OPPOSITION TO  
MOTION FOR PRELIMINARY  
INJUNCTION**

Hearing Date: August 19, 2019  
Hearing Time: 10:30 a.m.  
Courtroom: 5A  
Judge: Hon. Roger T. Benitez

## **DECLARATION OF MATTHEW D. CUBEIRO**

1. I am an attorney at the law firm of Michel & Associates, P.C., attorneys of record for plaintiffs in this action. I am licensed to practice law before the United States Court for the Southern District of California. I am also admitted to practice before the superior courts of the state of California and the United States Supreme Court. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. In early 2018, our office was notified that on January 22, 2018, the California Department of Motor Vehicles (“DMV”) would begin issuing REAL IDs that meet federal standards for boarding airplanes or entering federal facilities. Our office was also informed that such licenses would be optional, and that should an individual not meet the requirements for the issuance of a REAL ID, they would instead be issued an identification with the notation “FEDERAL LIMITS APPLY.”

3. Our office was also notified that DMV would issue a different identification for individuals pursuant to California Assembly Bill No. 60 (“AB 60”), which requires DMV to issue an original driver’s license to a person who is unable to submit satisfactory proof of their lawful presence in the United States. Our office was informed that such licenses would be distinguishable from those issued to persons who provided satisfactory proof of their lawful presence but otherwise did not obtain a REAL ID.

4. In February 2018, our office discovered that licenses issued pursuant to AB 60 were indistinguishable from those issued to individuals who were able to submit satisfactory proof of their lawful presence but did not obtain a REAL ID. After bringing this issue to the attention of DMV and the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), our office received guidance from ATF stating that an identification issued by DMV after January 22, 2018, could be used for the purchase of a firearm.

5. Following this guidance from ATF, the National Rifle Association and the California Rifle & Pistol Association both published an alert in March 2018 regarding the guidance provided by ATF (included as Exhibit 9 in Defendant’s exhibits). At that time,

the California Department of Justice had not provided any official guidance to California licensed firearm dealers or members of the public regarding the use of “FEDERAL LIMITS APPLY” identification when purchasing a firearm in California.

6. In April 2018, our office was informed that DOJ was considering emergency regulations regarding the use of “FEDERAL LIMITS APPLY” identification issued after January 22, 2018, when transferring a firearm.

7. In May 2018, our office received a letter from Deputy Attorney General P. Patty Li stating that “[g]oing forward, [DOJ] will inform interested parties that any valid California driver’s license or identification card may be used as “clear evidence of the person’s identity and age,” including REAL ID and “FEDERAL LIMITS APPLY” versions.” A true and correct copy of this letter is attached as **Exhibit 38**.

8. Despite the above guidance from DOJ, our office was later contacted by multiple California licensed firearm dealers who had received citations from DOJ agents for accepting “FEDERAL LIMITS APPLY” identification issued after January 22, 2018, when transferring a firearm.

9. In an effort to educate California licensed firearm dealers and individuals on the matter, on October 26, 2018, our office, on behalf of Plaintiff California Rifle & Pistol Association, Incorporated (“CRPA”), published an “Information Bulletin” regarding the purchase of a firearm using a REAL ID or “FEDERAL LIMITS APPLY” type license issued by the California Department of Motor Vehicles. This bulletin explained the steps taken by both DOJ and the Bureau of Alcohol, Tobacco, Firearms and Explosives up to that point and clarified that California residents “are ***not*** prohibited from purchasing a firearm simply because they have been issued a non-REAL ID from DMV.” A true and correct copy of this bulletin is attached as **Exhibit 39**.

10. A true and correct copy of Castillo-Carniglia, Kagawa, Cerdá, Crifasi, Vernick, Webster, Wintemute, *California’s Comprehensive Background Check and Misdemeanor Violence Prohibition Policies and Firearm Mortality*, Annals of Epidemiology 30, 50-56 (Oct. 11, 2018), is attached as **Exhibit 40**.

11. A true and correct copy of Ronald J. Frandsen, *Enforcement of the Brady Act, 2010: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2010*, Regional Justice Information Service, <https://www.ncjrs.gov/pdffiles1/bjs/grants/239272.pdf> (Aug. 2012), is attached as **Exhibit 41**.

12. A true and correct copy of an email chain between the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives and Plaintiffs' counsel regarding "California AB60 IDs and Real ID Act" is attached as **Exhibit 42**.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on August 12, 2019.

s/ Matthew D. Cubeiro  
Matthew D. Cubeiro  
Declarant

# **EXHIBIT 38**



**XAVIER BECERRA**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**

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May 18, 2018

**VIA EMAIL AND FIRST CLASS MAIL**

[REDACTED]  
Michel & Associates, P.C.  
180 E. Ocean Blvd., Suite 200  
Long Beach, CA 90802  
[REDACTED]

RE: Purchase of Firearms Using California Driver's Licenses or Identification Cards

Dear [REDACTED]:

I write in response to your April 9, 2018 letter, which asked that the California Department of Justice, Bureau of Firearms (BOF) "rescind [its] policy" that California licensed firearms dealers should not "accept a driver's license with the phrase 'FEDERAL LIMITS APPLY' on the front as 'clear evidence of the person's identity and age' when attempting to purchase a firearm no matter when the license was issued." (Letter, at p. 1.) As you are aware, recent changes to California driver's licenses and identification cards have caused the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to withdraw previously issued guidance on this topic. As explained below, BOF is no longer relying on that prior guidance regarding "FEDERAL LIMITS APPLY" licenses issued on or after January 22, 2018.

From January 2, 2015 to January 21, 2018, California driver's licenses and identification cards with the notation "FEDERAL LIMITS APPLY" imprinted on the front were issued only to persons applying under California State Assembly Bill 60 (AB 60), Stats. 2013, Ch. 524. That law allows the Department of Motor Vehicles to issue driver's licenses and identification cards without receiving satisfactory proof that the applicant's presence in the United States was authorized under federal law. As of January 22, 2018, however, California driver's licenses and identification cards with the words "FEDERAL LIMITS APPLY" on the front are now issued to both: (1) persons applying under AB 60; and (2) persons who may be able to submit satisfactory proof that their presence in the United States is authorized under federal law, but choose not to apply for a "REAL ID" driver's license or identification card. REAL ID licenses comply with minimum requirements for official federal purposes (including boarding federally regulated commercial aircraft), and do not bear the "FEDERAL LIMITS APPLY" disclaimer.

On June 30, 2016, ATF issued an "Open Letter to All California Federal Firearm Licensees," which stated that because a "FEDERAL LIMITS APPLY" driver's license "is only issued to a person who cannot provide proof of lawful presence in the United States," there is



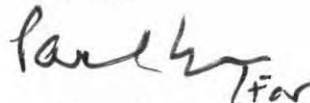
May 18, 2018

Page 2

“reasonable cause to believe a potential transferee in possession of an AB [60] driver[’s] license is illegally or unlawfully in the United States and prohibited from receiving or possessing firearms or ammunition. As such, you may not transfer firearms or ammunition to the person . . . .” Since the issuance of this open letter, BOF has relied on it in responding to inquiries from firearms dealers or members of the public regarding “FEDERAL LIMITS APPLY” driver’s licenses and identification cards. However, it is our understanding that, because “FEDERAL LIMITS APPLY” licenses are now being issued to the general public, and not only to AB 60 applicants, ATF recently withdrew the June 30, 2016 open letter, and BOF is no longer relying on it when responding to inquiries regarding “FEDERAL LIMITS APPLY” licenses issued on or after January 22, 2018.

Going forward, BOF will inform interested parties that any valid California driver’s license or identification card may be used as “clear evidence of the person’s identity and age,” including REAL ID and “FEDERAL LIMITS APPLY” versions. (Pen. Code, § 16400.) However, BOF will continue to advise interested parties that: (1) a “FEDERAL LIMITS APPLY” driver’s license or identification card issued **before** January 22, 2018 indicates that the applicant was unable to submit satisfactory proof that his or her presence in the United States is authorized under federal law; (2) it is unclear whether a person with a “FEDERAL LIMITS APPLY” driver’s license or identification card issued **on or after** January 22, 2018 was able to submit satisfactory proof that his or her presence in the United States is authorized under federal law; and (3) a person whose presence in the United States is not authorized under federal law is prohibited from receiving or possessing a firearm or ammunition, under federal law. (18 U.S.C. § 922(d)(5)(A).)

Sincerely,



P. PATTY LI  
Deputy Attorney General

For XAVIER BECERRA  
Attorney General

# EXHIBIT 39





## **INFORMATION BULLETIN:**

### **PURCHASING A FIREARM IN CALIFORNIA USING A REAL ID, NON-REAL ID, OR AB 60 TYPE LICENSE**

**October 26, 2018**

In 2005, the United States Congress enacted the REAL ID Act which, among other provisions, will require federally compliant identification (i.e., REAL ID) to board any airplane, enter any military base, or enter any federal facility as of October 1, 2020.<sup>1</sup> But it was unclear if this new law would also apply to the purchase of a firearm. To clarify the ambiguity, ATF in 2012 issued a newsletter clarifying that non-REAL IDs may continue to be used to purchase firearms so long as the provided ID satisfied the requirements under the Gun Control Act.<sup>2</sup>

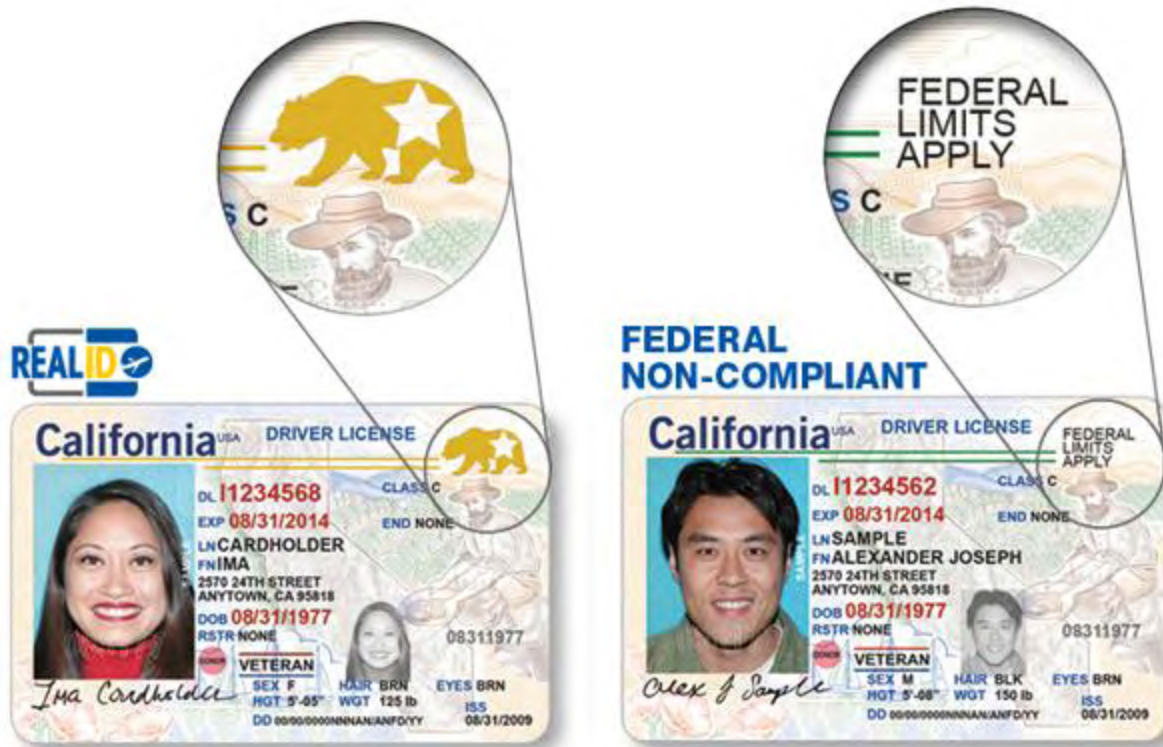
Then in 2013, California enacted Assembly Bill No. 60 ("AB 60"). This new law required the DMV to begin issuing licenses and IDs to individuals who could not provide proof of their lawful residence in the United States. Licenses and IDs issued pursuant to AB 60 had the words "FEDERAL LIMITS APPLY" printed on the front of the license or ID. Because federal law generally prohibits individuals who are not lawful residents of the United States from purchasing firearms,<sup>3</sup> ATF issued an open letter in June 2016 clarifying its position regarding its previously issued 2012 newsletter.<sup>4</sup> In this open letter, ATF stated that AB 60 licenses cannot be used to purchase a firearm.

<sup>1</sup> REAL ID Act of 2005, H.R. 418, 109th Cong.

<sup>2</sup> *FFL Newsletter: Federal Firearms Licensee Information Service*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-may-2012/download> (May 2012).

<sup>3</sup> As stated on the required 4473, the FFL "must establish the identity, place of residence, and age of the transferee/buyer. The transferee/buyer must provide a valid government-issued photo identification document to the transferor/seller that contains the transferee's/buyer's name, residence address, and date of birth." See *ATF E-Form 4473 (5300.9)*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (Oct. 2016).

<sup>4</sup> This letter has since been de-published from ATF's website and is no longer available. But a copy of this letter is available online at <http://michellawyers.com/wp-content/uploads/2018/09/Open-Ltr-to-All-CA-FFLs-re-AB60.pdf>.



*Examples of a REAL ID (left) versus a non-REAL ID (right)<sup>5</sup>*

At first, this clarification from ATF had no effect on a lawful resident's ability to purchase a firearm.<sup>6</sup> But then in January 2018, DMV began issuing non-REAL IDs to U.S. citizens. These IDs contained the same "FEDERAL LIMITS APPLY" language as those issued pursuant to AB 60 and were otherwise indistinguishable. As a result, lawful U.S. residents issued such a license were seemingly prohibited from purchasing a firearm according to ATF's open letter.

The issuance of non-REAL IDs identical to that of AB 60 type licenses by DMV resulted in mass confusion among law enforcement, California gun owners, and licensed firearm dealers. Our office immediately contacted ATF for clarification. At first, ATF responded that it received confirmation from DMV that IDs

<sup>5</sup> For more information regarding the REAL ID Act and how to obtain a REAL ID from DMV, visit <https://www.dmv.ca.gov/portal/dmv/detail/realid>.

<sup>6</sup> Nevertheless, AB 60 licenses presented a unique problem for California licensed firearm dealers, requiring dealers to physically inspect a subtle detail on the license. Outside of the "FEDERAL LIMITS APPLY" language on the front, such licenses and IDs constitute "clear evidence of the person's identity and age" as required for the purchase of a firearm because "clear evidence" is defined as a valid California Driver's License or ID and such IDs are in fact "valid" California licenses/IDs. See P.C. § 16400. This meant that unless a dealer physically inspected the license for such language, it is unlikely any part of the background check process would result in a denial for the attempted firearm purchase unless the person admitted to their unlawful presence in the United States on the required 4473 form.

issued pursuant to AB 60 will have additional language on the back distinguishing them from non-REAL IDs.<sup>7</sup> But this was later proven to be incorrect, as both types still had the same language printed on the back.<sup>8</sup> The exact reason for this remains uncertain, but we believe one root cause to be California's recent efforts to prevent the identification of individuals who cannot provide proof of their lawful presence in the U.S.—the same efforts that are currently being challenged in a lawsuit by the United States Department of Justice against California.<sup>9</sup>

After bringing this issue to ATF's attention, ATF de-published its 2016 open letter. In its place, ATF authored a new letter that stated California licensed firearms dealers:

*[M]ay accept post-January 22, 2018 licenses/identification documents that meet the definition in 18 U.S.C. 1028(d) in fulfilling their requirements under 18 U.S.C. 922(t)(1)(C) and 27 CFR 478.124(c)(3)(i). However, licensees may consider asking for additional documentation (e.g., passport) so that the transfer is not further delayed.*<sup>10</sup>

In other words, California residents who are issued non-REAL IDs after January 22, 2018, by DMV may use their IDs to purchase a firearm, even if the ID contains the language "FEDERAL LIMITS APPLY" on the front of the license. Despite this clarification from ATF, DOJ still maintained a position that any "FEDERAL LIMITS APPLY" licenses could not be used for purposes of purchasing a firearm. We don't know exactly what reason DOJ had for taking this position, but we do know it had no basis in law. My office requested clarification from DOJ, and after several weeks, we received a letter in response which stated:

*Going forward, [CA DOJ] will inform interested parties that any valid California driver's license or identification card may be used as "clear evidence of the person's identity and age," including REAL ID and "FEDERAL LIMITS APPLY" versions.*<sup>11</sup>

<sup>7</sup> See *Firearms Purchases and Identifications Issued by CA DMV*, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, <https://www.crpa.org/crpa-news/firearms-purchases-identification-issued-ca-dmv/> (last visited Sept. 18, 2018).

<sup>8</sup> See *Firearm Purchases and Identification Issued by CA DMV: Part 2*, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, <https://www.crpa.org/crpa-news/firearm-purchases-identification-issued-ca-dmv-part-2/> (last visited Sept. 18, 2018).

<sup>9</sup> See *Justice Department Files Preemption Lawsuit Against the State of California to Stop Interference with Federal Immigration Authorities*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/pr/justice-department-files-preemption-lawsuit-against-state-california-stop-interference> (March 7, 2018).

<sup>10</sup> See *REAL ID Update: Part 3*, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, <https://www.crpa.org/crpa-news/real-id-update-part-3/> (last visited Sept. 18, 2018).

<sup>11</sup> See *REAL ID Update: Part 3*, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, <https://www.crpa.org/crpa-news/real-id-update-part-3/> (last visited Sept. 18, 2018) (emphasis in original). But DOJ cautioned that they "will continue to advise interested parties that: (1) a "FEDERAL LIMITS APPLY" driver's license or identification card issued **before** January 22, 2018 indicates that the applicant was unable to submit satisfactory proof that his or her presence in the United States is authorized under federal law; (2) it is unclear whether a person with a "FEDERAL LIMITS APPLY" driver's license or identification card issued **on or after** January 22, 2018 was able to submit satisfactory proof that his or her presence in the United States is authorized under federal law; and (3) a person whose presence in the United States is not authorized under federal law is prohibited from receiving or possessing a firearm or ammunition, under federal law."

## THE BOTTOM LINE

Lawful California residents are ***not*** prohibited from purchasing a firearm simply because they have been issued a non-REAL ID from DMV. That said, CRPA has been informed that some DOJ field representatives are still instructing California licensed firearm dealers to not accept “FEDERAL LIMITS APPLY” licenses or IDs regardless of this letter from DOJ, leaving those dealers with a sense of confusion and hesitancy. CRPA is currently working to educate California licensed firearm dealers on this issue and update them with any information as it becomes available.

# **EXHIBIT 40**





Contents lists available at ScienceDirect

Annals of Epidemiology



## Original article

## California's comprehensive background check and misdemeanor violence prohibition policies and firearm mortality



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## ABSTRACT

**Purpose:** In 1991, California implemented a law that mandated a background check for all firearm purchases with limited exceptions (comprehensive background check or CBC policy) and prohibited firearm purchase and possession for persons convicted within the past 10 years of certain violent crimes classified as misdemeanors (MVP policy). We evaluated the population effect of the simultaneous implementation of CBC and MVP policies in California on firearm homicide and suicide.

**Methods:** Quasi-experimental ecological study using the synthetic control group methodology. We included annual firearm and nonfirearm mortality data for California and 32 control states for 1981–2000, with secondary analyses up to 2005.

**Results:** The simultaneous implementation of CBC and MVP policies was not associated with a net change in the firearm homicide rate over the ensuing 10 years in California. The decrease in firearm suicides in California was similar to the decrease in nonfirearm suicides in that state. Results were robust across multiple model specifications and methods.

**Conclusions:** CBC and MVP policies were not associated with changes in firearm suicide or homicide. Incomplete and missing records for background checks, incomplete compliance and enforcement, and narrowly constructed prohibitions may be among the reasons for these null findings.

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## Introduction

Firearm violence is one of the leading causes of death and injury in the United States, resulting in more than 38,000 deaths in 2016 [1]. Firearm ownership and access are risk factors for death from both suicide and homicide [2–6], and firearm access is a necessary precondition for committing firearm-related violent crimes.

Federal law prohibits certain categories of individuals from purchasing or possessing firearms; examples include persons

Conflict of interests: No potential conflicts of interest relevant to this article were reported.

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convicted of felonies or domestic violence misdemeanors [7]. To help prevent prohibited persons from acquiring firearms, the Brady Handgun Violence Prevention Act requires that purchases from federally licensed retailers be subject to a background check. Since Brady's inception in 1994, more than 3 million attempted purchases by prohibited persons have been denied [8]. Sales by unlicensed private parties are exempt from background check requirements in many states; however, it is estimated that more than 20% of all firearm acquisitions do not involve background checks [9]. About 80% of all firearms acquired for criminal purposes—96% of those acquired by prohibited persons—are obtained through private-party transfers [10].

Among legal purchasers of firearms, as in the general population, a history of violence is strongly associated with an increase in risk for future violence [11]. A prospective study of California handgun purchasers found that individuals with a

single prior conviction for a nonprohibiting violent misdemeanor crime (such as assault and battery) were nearly five times as likely as those with no prior criminal history to be arrested for a subsequent firearm-related or violent offense [12]. For purchasers with multiple such prior convictions, risk was increased by a factor of 15.

In 1991, California mandated background checks for nearly all firearm sales (a comprehensive background check [CBC] policy) and a 10-year prohibition on gun purchase and possession for persons convicted of most violent misdemeanor crimes (a misdemeanor violence prohibition [MVP] policy). These policies are complementary. Expanded background check requirements are meant to create an additional barrier to firearm access for prohibited persons; nationally, they are associated with a lower proportion of private-party firearm sales conducted without background checks (26% vs. 57%) [9]. Expanded prohibitions reflect an intent to reduce violence through preventing access to firearms by larger numbers of high-risk individuals.

We know little about the effectiveness of CBC policies. Studies showing clear benefits have focused on permit-to-purchase (PTP) laws, a particularly rigorous subset of CBC policies that require a background check and a permit, typically issued by a law enforcement agency, to purchase a firearm [13–17]. Some cross-sectional, ecological studies of CBC policies have shown negative associations between CBC laws and firearm mortality [18,19]. However, a more rigorous time-series analysis found no effect on firearm suicide and homicide rates from repealing CBC policies in two states [20]. Newly enacted CBC policies led to increases in background checks, presumably the principal mechanism by which they would exert intended effects on violence, in only 1 of 3 states studied [21].

Incomplete compliance and enforcement have been suggested as possible reasons for these findings. The possibility of these mechanisms of action is reinforced by studies showing benefits to more thorough background checks [22,23] and by well-known instances of violence, including mass shootings, where prohibited persons purchased firearms because the data on which their background checks were performed were incomplete [24].

Evaluations of MVP policies have yielded positive results, but the literature is sparse. At the individual level, a controlled longitudinal study of California's MVP policy found that denial of firearm purchase because of a prior violent misdemeanor conviction was associated with a substantial reduction in risk of arrest for future violent or firearm-related crimes [25]. A recent multistate

population-level study found similar benefits from MVP policies for intimate partner homicide [15].

The objective of our study was to evaluate the effects of California's CBC and MVP policies on firearm-related homicide and suicide. Given their simultaneous implementation and limited possibilities for estimating individual policy effects (both were intended to prevent high-risk people from acquiring firearms), we evaluated the two policies together.

## Methods

### Design and study sample

We used a quasi-experimental design at the state level, with California as the treated state and “treatment” defined as the simultaneous implementation of CBC and MVP policies in 1991. The control units, also known as the donor pool, were 32 states that did not have CBC or MVP policies at the start of the study period and did not implement them or other major firearm policy changes during that period (Table 1). The main analysis considered the preintervention period to be all years before the intervention for which data were available (1981–1990) and assessed effects for 10 years postintervention (1991–2000).

### Data sources and variables

**Outcomes:** Our main outcomes were the annual rates of firearm-related homicides and suicides per 100,000 people, available from the US Centers for Disease Control and Prevention [1]. As these data do not include numbers when there are fewer than 10 cases, we performed simple imputation using linear regression. This resulted in the imputation of 2 years for New Hampshire, South Dakota, Vermont, and Wyoming, and 1 year for Delaware. We rejected multiple imputation because inference in the synthetic control group method does not rely on variance estimates (the main concern in single imputation methods) but on permutation tests (see Supplemental Material).

To account for potential spurious associations and explore the influence of additional exogenous factors, we included rates of non-firearm-related homicides and suicides as negative control outcomes. The rationale is that these outcomes should not be affected by policies restricting access to firearms, but if there is a relationship, it should be in the opposite direction (i.e., other

**Table 1**  
States with nonzero weights in synthetic California for firearm and nonfirearm homicide and suicide rates<sup>a</sup>

State	Firearm homicide <sup>b</sup>	Nonfirearm homicide <sup>b</sup>	Firearm suicide <sup>b</sup>	Nonfirearm suicide <sup>b</sup>
Alaska	0	0.021	0	0
Arizona	0	0.015	0	0
Colorado	0	0.123	0	0
Georgia	0.101	0	0	0
Louisiana	0.259	0	0	0
Nevada	0	0.2	0	0.308
New Mexico	0	0.039	0	0
Ohio	0	0	0.681	0.237
Texas	0	0.603	0.319	0
Virginia	0.566	0	0	0
Wisconsin	0.073	0	0	0.455
RMSPE synthetic control/all control states	0.299/2.408	0.230/1.675	0.294/2.191	0.482/1.811

<sup>a</sup> States in the donor pool ( $n = 32$ ): Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

<sup>b</sup> Covariates included in the homicide models are percentage Hispanic; percentage black; percentage male; percentage living below the federal poverty line; percentage unemployment; percentage of population aged 15–29 years; percentage of population aged older than or equal to 65 years; number of gallons of ethanol from spirits consumed per capita; percentage veterans; gun availability (annual); outcomes at 1984, 1987, and 1990.

<sup>c</sup> Covariates included in the suicide models are the same as<sup>b</sup>, plus the natural logarithm of the states' populations.



methods would be substituted for firearms, increasing the rates of non-firearm-related deaths). A decline in the rates of non-firearm-related homicides and suicides associated with the implementation of CBC and MVP policies would likely be the result of other unmeasured confounders.

**Covariates:** Based on previous research [17,20] and model performance (lowest root mean square prediction error [RMSPE]), we defined the following set of covariates: percentage of people 15–29 years of age; percentage of people older than or equal to 65 years of age; logarithm of the population (which improved the RMSPE only for the suicide models); percentages of the population who were white, Hispanic, and males [1]; living below the federal poverty line, veterans [26], and unemployed [27]; the per capita consumption of gallons of ethanol from spirits by people aged older than or equal to 14 years [28]; and as an indicator of gun availability, firearm suicides as a percentage of total suicides [29,30]. We also included as predictors in the models the values of each of the outcomes at three time points in the preintervention period; using three time points yielded the lowest RMSPE: 1984, 1987, and 1990 [31,32].

In generating the final models, we removed variables with low V-weights, that is, variables with low predictive values in final models. Variables tested but not included were additional age and race/ethnicity categories; percentages of people with different categories of marital status and religion; an indicator for state mental health parity laws; a measure of the crack epidemic, which incorporates cocaine-induced emergency room visits, deaths, arrests, among other proxies [33]; and a violent crime index [34].

#### Statistical analyses

For the main analysis, we used the synthetic control group method, which aims to generate a trend counterfactual to the observed outcome by creating a weighted average of the states in the donor pool [32].

The policy effect is estimated as the difference between the values in the treated state (California) and the values in the synthetic control group (synthetic California) in the post-intervention period. Consistent with other studies that have used this method [20], we averaged the annual differences across the 10 years after CBC and MVP implementation (to the year 2000); in secondary analyses, we also considered 5 years (to 1995) and 15 years (to 2005) after the intervention. We did not include longer postintervention periods to avoid forecasting counterfactual trends too far removed from the preintervention period.

Given that the synthetic control group method does not produce traditional measures of uncertainty (e.g., 95% confidence intervals), inference is based on permutation tests, also known as placebo tests (see Supplemental Material).

To account for imperfect fit in the preintervention period, we provided estimates that subtracted the preintervention average difference between California and the synthetic control from the postintervention difference (as in a difference-in-difference estimator) [35,36]. In addition, we showed results produced by states that had a comparable fit in the preintervention period, that is, RMSPE less than or equal to 5 and less than or equal to 2 times the RMSPE for California [13].

We conducted multiple sensitivity analyses, which included removing states that prohibited firearm purchases by people convicted of domestic violence before the national enactment of such a law in 1996, testing for a delayed and gradual effect of CBC/MVP policies, restricting the population to the age groups that have the greatest risk of firearm-related homicide and suicide, and changing the methodological approach to estimate the results (see Supplemental Material).

All analyses were conducted using Stata 14.1 (StataCorp, College Station, Texas, USA).

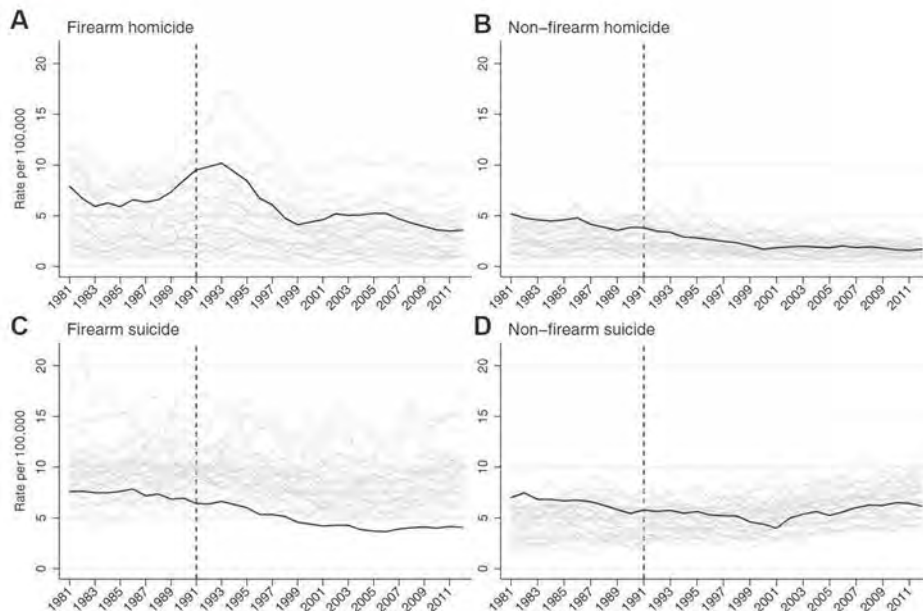


Fig. 1. Trends in annual rate of firearm homicides (A), non-firearm homicides (B), firearm suicides (C) and non-firearm suicides (D) per 100,000 people in California and all control.



## Results

Annual trends in firearm and nonfirearm homicide and suicide rates are in [Figure 1](#). California experienced a large increase in firearm-related homicides from the mid-1980s until the early 1990s (peaking at 10.2/100,000 people in 1993). A sharp decline followed until approximately 2000, then relative stabilization until 2012. Non-firearm-related homicides showed a stable decline, from the beginning of the time series until the first years of the 2000s.

For firearm-related suicides, there was an overall decline, concentrated mostly between the years 1997 and 2000. Non-firearm-related suicides showed a similar trend but with an increase from 2002 to the last years of the series.

### Results from the synthetic control group method

Of the 32 states in the donor pool, 11 had nonzero weights and were included in one or more of the synthetic controls for the four outcomes ([Table 1](#)). None of the states with imputed data were included in the synthetic controls.

Levels and trends for firearm homicide rates in the preintervention period were similar for California and synthetic California, although the increase in the 2 years before 1991 was slightly higher in California ([Fig. 2A](#)). For firearm suicides, California witnessed a similar trend compared with synthetic California until 1988, but a small relative decline thereafter ([Fig. 2C](#)). Nonfirearm outcomes for California and all control states are shown in [Figure 1B](#) and [D](#). Both were well balanced in the preintervention period in relation to the trend in synthetic California.

Estimated absolute and relative effects of CBC and MVP policies on each outcome and the results from the permutation tests are presented in [Table 2](#). The 10-year postintervention period

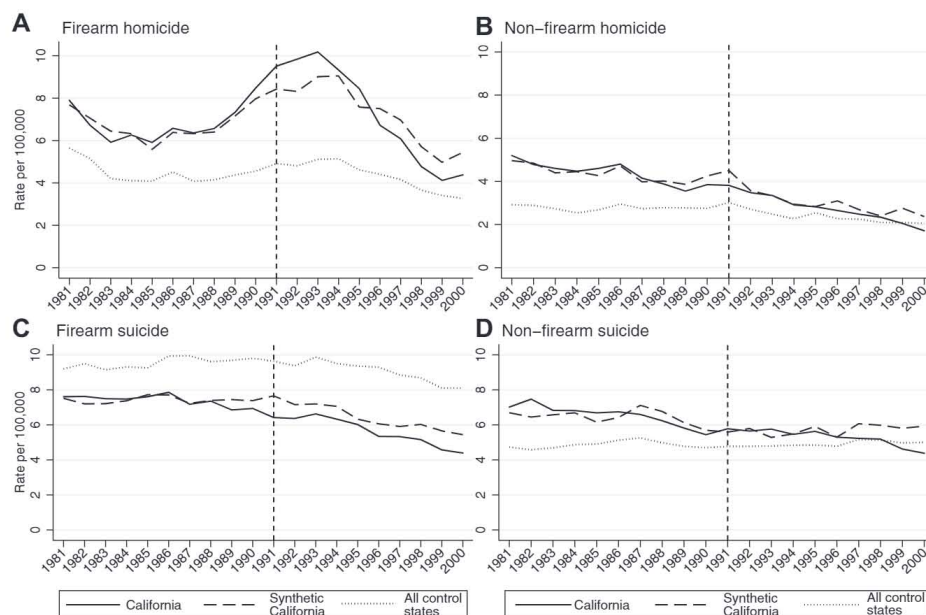
provided our primary results. The average difference in the rate of firearm homicides between California and synthetic California in the postintervention period was 0/100,000; for firearm suicides, it was  $-0.7/100,000$ , corresponding to a 10.9 percent decrease. Five of the 32 states eligible to serve as controls experienced larger effects for firearm suicides over the same time period in the permutation tests. However, after restricting the comparison states to those with a reasonable preintervention fit ( $\leq 2$  times the RMSPE for California), no states (out of 11) experienced a decrease larger than California. Consistent results were observed for firearm homicides and suicides at both 5 and 15 years postintervention.

In the 10 years following implementation, the average differences in nonfirearm homicides and suicides were  $-0.3/100,000$  ( $-9.7$  percent) and  $-0.4/100,000$  ( $-7.0$  percent), respectively. For nonfirearm suicides, only one state experienced a larger decrease than California, regardless of the number of control states used as comparison. For the nonfirearm homicide rate, the decline observed after policy implementation was within the range that would be expected given random variation.

Results from sensitivity analyses were consistent with those of the main analysis (see [Supplemental Material](#)).

## Discussion

This study evaluated the association between rates of firearm-related homicides and suicides and California's simultaneous enactment of two policies aimed at preventing firearms acquisition by people who are at increased risk of interpersonal and self-directed violence: a comprehensive background check requirement and a firearm prohibition for persons convicted of violent misdemeanors. Enactment was not associated with significant and specific changes in rates of fatal firearm violence.



**Fig. 2.** Trend in annual rate of firearm homicides (A), non-firearm homicides (B), firearm suicides (C) and non-firearm suicides (D) per 100,000 people in California, synthetic California, and average for all control states, 1981–2000.

**Table 2**

Association between CBC and MVP policies and firearm-related and non-firearm-related homicides and suicides in California for 3 post-implementation periods

	Firearm homicide	Nonfirearm homicide	Firearm suicide	Nonfirearm suicide
Five years postimplementation				
California's rate per 100,000 <sup>a</sup>	9.5	3.3	6.4	5.7
Counterfactual rate per 100,000 <sup>b</sup>	8.5	3.4	7.1	5.6
Estimated absolute effect of CBC/MVP <sup>c</sup>	1.0	−0.1	−0.7	0.1
Estimated relative effect (%) of CBC/MVP <sup>d</sup>	11.8	−2.9	−9.9	1.8
Number of states with effect ≥ CA				
All control states <sup>e</sup>	27/32	11/32	4/32	14/32
≤5 × CA RMSPE	26/30	11/32	3/30	14/32
≤2 × CA RMSPE	15/17	6/18	1/11	12/28
Ten years postimplementation (main results)				
California's rate per 100,000 <sup>a</sup>	7.3	2.8	5.7	5.3
Counterfactual rate per 100,000 <sup>b</sup>	7.3	3.1	6.4	5.7
Estimated absolute effect of CBC/MVP <sup>c</sup>	0.0	−0.3	−0.7	−0.4
Estimated relative effect (%) of CBC/MVP <sup>d</sup>	0.0	−9.7	−10.9	−7.0
Number of states with effect ≥ CA				
All control states <sup>e</sup>	17/32	6/32	5/32	1/32
≤5 × CA RMSPE	16/30	6/32	4/30	1/32
≤2 × CA RMSPE	10/17	2/18	0/11	1/28
Fifteen years postimplementation				
California's rate per 100,000 <sup>a</sup>	6.6	2.5	5.1	5.2
Counterfactual rate per 100,000 <sup>b</sup>	6.8	2.9	6.2	6.0
Estimated absolute effect of CBC/MVP <sup>c</sup>	−0.2	−0.4	−1.1	−0.8
Estimated relative effect (%) of CBC/MVP <sup>d</sup>	−2.9	−13.8	−17.7	−13.3
Number of states with effect ≥ CA				
All control states <sup>e</sup>	11/32	3/32	3/32	1/32
≤5 × CA RMSPE	10/30	3/32	2/30	1/32
≤2 × CA RMSPE	5/17	0/18	0/11	1/28

<sup>a</sup> Mean rate per 100,000 people in California after CBC and MVP implementation.<sup>b</sup> Mean rate per 100,000 people in synthetic California after CBC and MVP implementation.<sup>c</sup> Average difference between California and synthetic California in the postintervention period.<sup>d</sup> Percentage difference compared with synthetic California.<sup>e</sup> Results from the permutation test (control states = 32). To generate comparable estimates across control states, effects were computed as a difference in difference (DiD):  $DiD_{state} = (Outcome_{state}^{post} - Outcome_{state}^{synth}) - (Outcome_{CA}^{post} - Outcome_{CA}^{synth})$ . Because the hypothesis of the study is that CBC and MVP are associated with reductions in mortality from firearms, we counted only states with reductions in mortality larger than those in California.

Firearm-related suicide rates during the 10 years after policy implementation were, on average, 10.9 percent lower in California than in synthetic California, a difference greater than for any of the 11 control states with a comparable model fit. Non-firearm-related suicides also decreased by 7.0 percent; however, a decrease exceeding that was seen in 27 of 28 states with RMSPE less than or equal to two times the RMSPE for California. This suggests that the policies' estimated impact on firearm suicide may be part of broader changes in suicide risk around the time that California's CBC and MVP policies were implemented. Still, the difference between changes in firearm and non-firearm suicides (3.9 percentage points) may indicate a preventive role of CBC/MVP policies in firearm suicide, although this study was not designed to test whether this difference is statistically meaningful.

Firearm-related homicide rates rose substantially from the mid-1980s through the early 1990s and fell thereafter. Both the increase and the decline were greater in California than in synthetic California; the net difference during the 10 years postintervention was practically 0. Sensitivity analyses testing for delayed and gradual effects did not change the overall conclusions. It is worth noting that the negative slope observed in California in the years following CBC/MVP implementation was more pronounced than the slope observed for the control states; however, the difference in slopes between California and the control group was not statically significant (see [Supplemental Material](#)).

Our findings conflict with those of studies associating CBC policies with a reduction in firearm homicide and suicide in Connecticut, where implementation occurred in 1995, and Missouri, where firearm homicide and suicide increased following CBC repeal in 2007 [13,14,17]. However, these states had PTP laws, a particularly rigorous form of CBC policy that several studies have found to be effective [37–39]. Consistent with our findings, repeal by

Indiana and Tennessee in 1998 of CBC policies without a PTP component was recently found not to be associated with changes in rates of firearm homicide or suicide [20].

Other mechanisms for our findings are plausible; however, several or all may be in play simultaneously. One well-documented example, which would diminish the population-level effects of both CBC and MPV policies, is that the criminal and mental health records on which background checks were performed were very incomplete in the 1990s, including in California [37–42]. For example, in 1990, only 25 percent of criminal records were accessible via the interstate identification index, the primary source of arrest and conviction information for background checks [37]. Centralized records of mental health prohibitions were almost nonexistent [37]. As a result, background checks almost certainly produced a large number of false negative results, which is a shortcoming that may have limited the effectiveness of the CBC and MVP policies.

Purchases by undetected prohibited persons would likely decrease the population-level effects of CBC policies and may account in part for negative findings here, in the assessment of CBC repeal in Indiana and Tennessee [20], and in an earlier study of trends in homicide and suicide following the Brady Handgun Violence Prevention Act [43]. Increased thoroughness of background checks and improvements in the data used to perform them are associated with reductions in violent crime, firearm homicide, and firearm suicide [22,23,44–46]. It is therefore important to note that the quality and completeness of the records on which background checks are performed have improved since our study period [47].

Incomplete compliance with and enforcement of background check and prohibition requirements may also play a role. After CBC policies were implemented in Colorado, Delaware, and



Washington, an overall increase in background checks was detected only in Delaware, and incomplete compliance and enforcement were reported in the two western states [21]. Enforcement may not be a law enforcement priority; in the 1990s, chief law enforcement officers in Montana and Arizona sued successfully to avoid conducting background checks [48]. The vigor with which firearm laws are enforced is variable and susceptible to a variety of external factors [49].

Finally, the population-level effect of CBC and MVP policies may be small if only a small number of transactions or individuals are affected. In California, on average, 0.54 percent of handgun purchases were denied before CBC and MVP policy implementation (data available from 1982 to 1990); this rose to 1 percent in the 10 years following implementation (1991–2000) [50]. The increase represents an annual average increase in denials of handgun purchases by approximately 1250 people considered to be at risk—a number too small, perhaps, for a decrease in firearm-related violence among those individuals to produce a detectable change in state-level, population-based outcome measures. A similar argument has been advanced as partial explanation for the lack of observed effects on homicide of the Brady Act [51,52]. California's MVP policy has been shown to have a substantial beneficial effect on those directly affected, however [25], and a multistate population-level analysis has associated MVP policies with a decrease in intimate partner homicide [15].

### Limitations

We carefully identified states that were “at risk” of implementing CBC and MVP policies and used additional criteria to select control states in sensitivity analyses (e.g., excluding states that had banned firearm purchases by people convicted of domestic violence before 1996, when this policy was adopted nationwide). Although we are fairly confident that no other major firearm policies were implemented during the study period in our study states, we cannot be certain about other policies (e.g., criminal, public health, or social policies) or idiosyncratic changes at the local level that may have affected firearm violence, including firearm homicide, the frequency of which was particularly unstable during our study period. Finally, in 1998, the National Instant Criminal Background Check System was launched; the interim provisions of the Brady Law, including a 5-day waiting period, were removed; and the federal background check requirement for handgun sales by licensed retailers was extended to rifles and shotguns. These changes may have had mixed and varying effects on our control states in the final two years of our study period; California had a waiting period throughout the time of our study.

### Conclusions

Our findings suggest that the simultaneous implementation of CBC and MVP policies did not result in population-level changes in the rates of firearm-related homicides and suicides in California. A combination of inadequate criminal and mental health records, incomplete compliance and enforcement, the absence of a permit requirement, and the small size of the population directly affected by the laws may account for these findings.

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### Supplementary data

Supplementary data related to this article can be found at <https://doi.org/10.1016/j.annepidem.2018.10.001>.

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# EXHIBIT 41



**The author(s) shown below used Federal funds provided by the U.S. Department of Justice and prepared the following final report:**

**Document Title:** Enforcement of the Brady Act, 2010: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2010

**Author:** Ronald J. Frandsen

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**Errata Notice:** This report has been updated to correct two errors: on page 8, the date was listed incorrectly in the first sentence as November 28, 2010. The correct date is December 13, 2011. On page 14 in Appendix Table F., the date listed in parentheses was incorrectly listed as December 13, 2010. The correct date is December 13, 2011.

**This report has not been published by the U.S. Department of Justice. To provide better customer service, NCJRS has made this Federally-funded grant final report available electronically in addition to traditional paper copies.**

<p><b>Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.</b></p>
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## **Enforcement of the Brady Act, 2010**

Federal and state investigations and prosecutions of  
firearm applicants denied by a NICS check in 2010

Ronald J. Frandsen

*Regional Justice Information Service*  
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August, 2012

## **Enforcement of the Brady Act, 2010**

### **Abstract**

The Brady Handgun Violence Prevention Act (Brady Act) requires criminal history background checks by the Federal Bureau of Investigation (FBI) and state agencies on persons who attempt to purchase a firearm from a licensed dealer. In 2010, the FBI and state agencies denied a firearm to nearly 153,000 persons due to National Instant Criminal Background Check System (NICS) records of felonies, domestic violence offenses, and other prohibiting factors. *Enforcement of the Brady Act, 2010* reports on investigations and prosecutions of persons who were denied a firearm in 2010. The report describes how the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) screens denied-person cases and retrieves firearms that were obtained illegally. Statistics presented include charges most often filed against denied persons by United States Attorneys and results of prosecutions. Investigation statistics from two states are also presented. Key statistics are compared for the five-year period from 2006 to 2010. Statistical highlights are presented in the body of the report and complete details are included in an Appendix.

### **Disclaimer**

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## Background

**The Brady Act.** The Brady Handgun Violence Prevention Act (Brady Act) was enacted in 1993 to provide a method for blocking transfers of firearms to prohibited persons. From February 28, 1994 to November 30, 1998, the interim Brady provisions, 18 U.S.C. 922(s), required a Federal Firearms Licensee (FFL) to request a background check on a handgun applicant from the Chief Law Enforcement Officer (CLEO) of the jurisdiction where the licensee operated. A handgun could be transferred if a notice of denial was not transmitted to the FFL within five days by the CLEO.

**National Instant Criminal Background Check System.** Pursuant to the permanent provisions of the Brady Act, 18 U.S.C. 922(t), the NICS began operations on November 30, 1998. The NICS allows a licensee to contact the system by telephone or other electronic means for information, to be supplied immediately, on whether receipt of a firearm by a transferee would violate federal or state law. In addition to regulation of handgun sales, the permanent provisions mandate background checks on long gun purchasers and persons who redeem a pawned firearm. A licensee has the option of requesting a check on a person who attempts to pawn a firearm.

A NICS inquiry is not required if a transferee presents a state permit qualified by ATF as an alternative to the point-of-transfer check. Qualified permits allow a transferee to possess, acquire, or carry a firearm, and were issued not more than five years earlier by the state in which the transfer is to take place, after verification by an authorized government official that possession of a firearm by the transferee would not be a violation of law. A permit issued after November 30, 1998 qualifies as an alternative only if the information available to the state authority includes the NICS.

The NICS process begins when a licensee receives a completed Firearms Transaction Record (ATF Form 4473) and a government-issued photo identification from an applicant. Completion of a state disclosure form may also be required. Submitting false information in regard to a firearm transaction is illegal under federal law and many state statutes.

A licensee initiates a NICS check by contacting either the Federal Bureau of Investigation (FBI) or a point of contact (POC) agency designated by state government. The FBI and the POC agencies always check three major federal databases, the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index. If the transferee is not a citizen of the United States, the NICS will query Bureau of Immigration and Customs Enforcement (ICE) records. A POC may check additional state records. A check may include contacting an agency that maintains a record that the FBI or POC cannot access directly.

After a search of available federal and state records, the checking agency responds with a notice to the licensee that the transfer may proceed, may not proceed, or is delayed

pending further review of the applicant's record. If further review of a record indicates that the transfer would not violate federal or state law, the checking agency notifies the licensee that the transfer may proceed. If the licensee does not receive a response within three business days, the transfer may proceed at the licensee's discretion. A person who is not allowed to proceed may appeal to the FBI or POC and submit information to correct the record on which the denial was based.

NICS checking agencies most often block the transfer of a firearm or a permit to a person whose records indicate a felony indictment or conviction, a fugitive warrant, unlawful drug use or addiction (within the prior year), a mental defective adjudication or an involuntary commitment to a mental institution, illegal or non-immigrant alien status, a domestic violence restraining order, or a misdemeanor domestic violence conviction. These and other prohibitors are stated in the Gun Control Act (GCA), 18 U.S.C. 922. A NICS denial may also be based on a state law prohibition.

**NICS Denials in 2010.** The FBI conducted over six million NICS transfer checks in 2010 and denied over 72,000 applications, a denial rate of about 1%. The most common reason for denial by the FBI was a record of a felony indictment or conviction (over 47%), followed by fugitives from justice (19%), and state law prohibitions (about 11%) (Table 1). Other reasons included drug use or addiction (about 10%), domestic violence misdemeanor convictions (over 6%), and domestic violence restraining orders (over 4%) (Appendix table A).

**Table 1. Background checks by the FBI in 2010**

	Number	Percent
Applications for firearm transfer	6,037,394	
Denials / denial rate	72,659	1.2%
Most common denial reasons / percent of denials		
Felony indictment or conviction	34,459	47.4%
Fugitive	13,862	19.1%
State law prohibition	7,666	10.6%

## ATF Investigations

Denial data is electronically transmitted by the FBI on a daily basis to ATF's Denial Enforcement and NICS Intelligence (DENI) Branch (formerly Brady Operations Branch). Transactions denied by the FBI contain data on prohibited persons who unlawfully attempted to purchase a firearm. Some prohibited persons obtain a firearm during a "delayed transaction," where the FBI has not completed a check in three business days and the dealer is allowed to transfer the firearm. When the FBI finds a prohibitory record and is informed by the dealer that a transfer occurred, a "delayed denial" referral is made to ATF.

As a way to assist ATF investigations, the FBI NICS Section implemented a system enhancement that ranks a delayed denial transaction based on ATF categories applicable to the specific denial and separates the ranked delayed denials from the standard denials. (*NICS Operations 2005*, FBI CJIS Division, January 2006, [http://www.fbi.gov/about-us/cjis/nics/reports/2005-operations-report/ops\\_report\\_2005.pdf](http://www.fbi.gov/about-us/cjis/nics/reports/2005-operations-report/ops_report_2005.pdf)).

In addition, the DENI Branch queries the daily NICS referrals to identify collateral (pre-pawn) checks where a person who attempted to pawn a firearm was found to be prohibited. Research by the DENI Branch that covered October 2001 to November 2005 concluded that collateral checks have a denial rate of 3.3%, which is over two times greater than the overall FBI denial rate. The pawnbroker who requested the collateral check is contacted to find out if the denied person left the pawnshop with the firearm. If the denied person still possesses the firearm, the referral is expedited in the same manner as a delayed denial. If the pawnbroker retained the firearm, the denial is processed as a standard denial.

The DENI Branch searches databases available to ATF for additional data on denied persons referred by the FBI. After an initial screening, denials are referred to the 19 ATF field divisions serviced by the DENI Branch (six other divisions' territories are only comprised of POC states). All delayed denials are required to be referred within 48 hours. Routinely, delayed denials are referred within 24 hours of receipt from the FBI. Referrals are made in accordance with criteria established for the federal judicial districts within each division's territory. ATF and United States Attorneys have developed referral criteria for all 94 judicial districts that reflect the types of cases most likely to merit prosecution. Cases involving restraining orders, domestic violence misdemeanors, non-immigrant aliens, violent felonies, warrants, and indictments are most often included in referral criteria.

The DENI Branch screened 76,142 NICS denials received from the FBI during 2010, and referred 4,732 denials (approximately 6%) within the established guidelines to field divisions. The referred cases were made up of 2,265 delayed denials (3% of all denials) and 2,467 standard denials (over 3%). The remaining denials (71,410, or nearly 94%) did not meet referral guidelines or were overturned or canceled. Overturns occurred after review by the DENI Branch or after the FBI received additional information. The FBI canceled a small number of denials in cases where a NICS check should not have been conducted. (Table 2.) Standard denials that are not being referred are reported weekly to the field divisions and made available in a database if further review is deemed necessary.

Denials that were caused by protective orders, felony convictions, and domestic violence misdemeanor convictions comprised nearly 76% of referrals to field divisions. (Table 2.) Somewhat less frequent were referrals involving persons who were an unlawful user of a controlled substance, under indictment or information, or a fugitive

from justice. The six most common reasons for referral accounted for about 98% of the cases. (Appendix table B.)

**Table 2. NICS denials by FBI referred to ATF field divisions in 2010**

	Cases	Percent
FBI denials referred to ATF DENI Branch	76,142	100.0%
DENI Branch referrals to ATF field divisions	4,732	6.2%
Delayed denials	2,265	3.0%
Standard denials	2,467	3.2%
Not referred to field, overturned, or canceled	71,410	93.8%
Most common reasons for referrals to field		
Subject to protective order	1,395	29.5%
Convicted felon	1,144	24.2%
Domestic violence misdemeanor	1,049	22.2%

A NICS coordinator in each ATF division receives and distributes referrals to the appropriate field office. A state point of contact may also refer denials to the nearest field office. Special agents at the field offices verify conviction and prohibition information and conduct additional investigations. The FBI is notified if ATF determines that a person should not have been denied.

In a delayed denial case, the agent contacts the firearm purchaser and seizes or takes an abandonment of the firearm or coordinates a transfer of the firearm to a licensed dealer or to a third party who is not a prohibited person. In POC states, a retrieval may be handled by local law enforcement, a statewide firearms unit, or ATF. In addition to the delayed denials, a small number of 2010 standard denials potentially involved unlawful firearm possession. Field offices investigated a total of 1,923 unlawful possession cases that began in 2010. A retrieval of a firearm (or firearms) from a prohibited person by field agents occurred in 1,164 (about 61%) of the cases. The subject of the investigation was cleared in 509 cases (approximately 27%). About 93% of the cases had been resolved by December 13, 2010, with the subject missing in nearly 7% of the cases. (Table 3.)

**Table 3. Outcomes of 2010 unlawful possession cases**

	Cases	Percent
Total	1,923	100.0%
Retrieval of a firearm (or firearms)	1,164	60.5%
Subject not prohibited	509	26.5%
Unable to locate subject	128	6.7%
Other outcomes	122	6.3%

The 1,164 retrieval cases reached the following resolutions: transfers to non-prohibited third parties - 577 (30% of total cases); returns to firearms dealers - 505 (about 26%); seizures by ATF - 47 (over 2%); and abandonments by transferees - 35 (nearly 2%). These cases resulted in retrieval of 1,181 firearms. (Appendix table C.) Charges were

referred for prosecution in 11 cases where ATF retrieved a firearm and in two cases that were given to local law enforcement.

### Prosecutions by U.S. Attorneys

When an investigation is complete, the field office and the U.S. Attorney decide whether the case merits prosecution. A case that is not deemed appropriate for federal prosecution may be referred to a state prosecutor. If the U.S. Attorney decides to prosecute, an arrest is made or a warrant is issued.

Field offices declined to refer 4,184 cases for prosecution. The most common reasons for declinations were no prosecutive merit (1,661 cases or almost 40%), federal or state guidelines were not met (1,092 cases or 26%), and subjects found to not be prohibited (480 cases or about 12%). (Table 4). Other reasons for declination by a field office included closure by a supervisor (457 or 11%) and no potential or unfounded (396 cases or about 10%). (Appendix table D.)

**Table 4. 2010 cases declined by ATF field offices**

	Cases	Percent
Total	4,184	100.0%
Most common reasons for declination		
No prosecutive merit	1,661	39.7%
Federal or state guidelines not met	1,092	26.1%
Not a prohibited person	480	11.5%

A total of 62 charges from the 2010 cases were referred by field offices for consideration by prosecutors. The most common charge referred was submitting falsified information when buying firearms, which accounted for 22 charges and 36% of all charges. The second and third most common charges were possession of a firearm by a convicted felon (11 charges or approximately 18%) and possession of a firearm after a domestic abuse charge (7 charges or about 11%). (Table 5.)

**Table 5. Charges referred for prosecution, 2010**

Charge definition	Charges	Percent
Total	62	100.0%
Falsified information when buying firearms	22	35.5%
Possession of firearm by convicted felon	11	17.7%
Possess firearm after domestic abuse charge	7	11.3%
Receive/ship/transport firearm after indictment	5	8.1%
Other charges	17	27.4%

Subsections of the Gun Control Act, 18 U.S.C. 922, were the basis for 49 charges (approximately 79% of all charges). The 2010 cases produced charges referred for prosecution against 33 persons, 25 from delayed denials and 8 from standard denials. (Appendix table E.)

Of the 62 charges referred from the 2010 cases, 18 (29%) had been declined by a prosecutor as of December 13, 2011. A guilty plea was obtained on 13 charges (about 21%) and 10 charges (about 16%) were dismissed as part of a plea agreement. Twelve charges (approximately 19%) were still pending action by a prosecutor as of December 13, 2011. (Table 6.) In addition, five charges (8%) were dismissed prior to or after an indictment (Appendix table F).

**Table 6. Status of 2010 charges referred for prosecution**

Judicial status	Charges <sup>a</sup>	Percent
Total	62	100.0%
Selected outcomes:		
Declined by prosecutor	18	29.0%
Guilty plea by defendant	13	21.0%
Pending action by prosecutor	12	19.4%
Dismissed per plea agreement	10	16.1%

<sup>a</sup>As of December 13, 2011

Of the 13 charges that resulted in a guilty plea, six (about 46%) were for possession of a firearm by a convicted felon and two (over 15%) were for receiving, shipping, or transporting a firearm after an indictment (Table 7). State offenses accounted for three of the charges and the remainder were federal charges. Ten charges in the guilty pleas (nearly 77%) were based on subsections of the Gun Control Act. Of the 13 defendants who pled guilty, 11 were from delayed denial cases and two were from standard denial cases. (Appendix table G.)

**Table 7. 2010 charges that resulted in guilty pleas**

Charge definition	Charges	Percent
Total	13	100.0%
Possession of firearm by convicted felon	6	46.2%
Receive/ship/transport firearm after indictment	2	15.4%
Other charges	5	38.4%

## Federal Judicial District Summary

The District of Arizona had the highest number of unlawful possession investigations from the 2010 cases (154), followed by the Southern District of Texas (86). The District of Arizona had the most field office declinations (240), followed by the Eastern District of Kentucky (192). The highest number of charges referred for prosecution was in the Northern District of Indiana (12), which also had the most charges that resulted in a guilty plea (5). (Appendix table H.)



## Comparisons With Prior Years, 2006-2010

Data on enforcement of the Brady Act is available for the five-year period from 2006 to 2010. Selected statistics from each year's cases are summarized in Appendix table I. FBI referrals of NICS denials to the DENI Branch decreased about 1%, from 77,233 in 2006 to 76,142 in 2010. The DENI Branch's referrals to ATF field divisions decreased nearly 50%, from 9,432 for 2006 to 4,732 for 2010. Unlawful possession investigations decreased by 26% from 2006 to 2010 and investigations that resulted in a firearm retrieval decreased by over 21%. The number of charges referred by field offices for prosecution fell by over 77%, from 273 for the 2006 cases to 62 for the 2010 cases. The number of charges that resulted in guilty pleas and verdicts fell by about 82%, from 73 for the 2006 cases to 13 for the 2010 cases. (Appendix table I). Citations to the prior years' reports are listed in the appendix table.

## State Investigations of Denied Persons, 2006-2010

As of December 31, 2010, 13 states maintained a full point of contact for the NICS and conducted background checks on all persons who applied to purchase a firearm from a licensed dealer. Eight states maintained a partial NICS point of contact and conducted checks on all persons who applied to purchase a handgun from a dealer (the FBI checked long gun purchasers in these states). See *Background Checks for Firearm Transfers, 2010* (publication pending). In addition, six states require an applicant for a purchase or a purchase permit to undergo a background check that does not access the NICS Index.

When a denied person is suspected of violating federal law, most state point-of-contact agencies refer the case to the nearest ATF field office. States differ as to how potential state law violations are investigated. In some states, the checking agency immediately notifies the police or sheriff's department that has jurisdiction over a denied person's residence or the gun shop where the transaction occurred. The local agency is then responsible for investigation and prosecution of the case. Other states have a unit with statewide jurisdiction that screens cases before deciding whether a referral should be made to a state police troop or local law enforcement. Data on denied person investigations from two states is available for the five-year period from 2006 to 2010.

**Pennsylvania.** The Pennsylvania State Police (PSP) Firearms Division is a NICS point of contact and conducts background checks on prospective firearm purchasers. PSP denials that involve federal prohibitions are referred to ATF. Cases with potential state law violations may be referred to PSP troops or local law enforcement. PSP denied 10,596 firearm transfers in 2010, an increase of almost 11% from the 9,535 denials issued in 2006. Denials referred for investigation increased about 55%, from 285 in 2006 to 441 in 2010. Apprehensions of wanted persons decreased from 119 in 2006 to 114 in 2010 (about 4%) and reported arrests increased from 194 in 2006 to 205 in

2010 (about 6%). Convictions of denied persons decreased by over 25%, from 173 in 2006 to 129 in 2010. (Appendix table J.)

**Virginia.** The Virginia State Police (VSP) Firearms Transaction Center is a NICS point of contact and conducts background checks on prospective firearm purchasers. VSP reports denied persons with federal prohibitors to ATF. Potential state law violations are reviewed by VSP Troopers, who consult with Commonwealth Attorneys as part of their investigative process. VSP denied 2,999 firearm transfers in 2010, a 26% increase from the 2,380 denials issued in 2006. Denials referred for investigation decreased by approximately 6%, from 1,005 in 2006 to 942 in 2010. The number of reported arrests increased by about 16%, from 727 in 2006 to 846 in 2010. In addition, VSP investigations led to the apprehension of 65 wanted persons and the retrieval of 6 firearms from prohibited persons in 2010. (Appendix table K.)

## **Methodology**

The DENI Branch provided the Regional Justice Information Service (REJIS) with statistics on denied person cases received from the FBI's NICS Section and referred to ATF field offices after screening. The National Field Office Case Information System (NFOCIS) unit provided REJIS with records from ATF's case management system (NForce) on field office and U.S. Attorney processing. The records reflect activity up to December 13, 2011. Court decisions are included in the records but sentencing information was not available.

No personal identifiers were included in the records. Cases or charges could only be distinguished by NICS numbers. NICS numbers for the 2011 cases were compared to those for the 2010 cases and a small number of duplicate entries were deleted. In calculating the number of persons referred for prosecution and the number of persons convicted, it was assumed that each separate NICS number represented one person. However, it is possible that a person could have more than one NICS number.

## **Additional Contributors**

Scott Stargel, ATF  
Provided case management data

Jennifer Karberg and Gene Lauver, REJIS  
Terrence Clark, Busey Ward, and Christine Raposa, ATF  
Reviewed the report



## Appendix

**Table A. Background checks on firearm applicants processed by the FBI in 2010**

	FBI / NICS <sup>a</sup>	
	Number	Percent
Applications	6,037,394	
Denials / Denial rate	72,659	1.2%
Appeals / Appeal rate	16,513	22.7%
Appeals reversed / Reversal rate	3,491	21.1%
Reasons for denials:		
Felony indictment/conviction	34,459	47.4%
State law prohibition	7,666	10.6%
Domestic violence		
Misdemeanor conviction	4,475	6.2%
Restraining order	3,107	4.3%
Fugitive	13,862	19.1%
Illegal or non-immigrant alien	576	0.8%
Mental illness or disability	1,292	1.8%
Drug use or addiction	6,971	9.6%
Other prohibitions <sup>b</sup>	251	0.3%

-- Not applicable

<sup>a</sup>Firearm transfer transactions reported by the FBI NICS Section.

<sup>b</sup>Includes juveniles, persons dishonorably discharged from the Armed Services, persons who have renounced their U. S. citizenship, and other unspecified persons.

**Table B. NICS denials by FBI referred to ATF field divisions in 2010**

	Cases	Percent
FBI denials referred to ATF DENI Branch	76,142	100.0%
DENI Branch referrals to ATF field divisions		
Total referred to field	4,732	6.2%
Delayed denials	2,265	3.0%
Standard denials	2,467	3.2%
Not referred to field	68,209	89.6%
Not referred and overturned	3,163	4.2%
Canceled	38	---
Reasons for referrals to ATF field divisions		
Subject to protective order	1,395	29.5%
Convicted felon	1,144	24.2%
Domestic violence misdemeanor	1,049	22.2%
Unlawful user of controlled substance	411	8.7%
Under indictment or information	344	7.3%
Fugitive from justice	286	6.0%
Adjudicated mentally defective	46	1.0%
Illegal or unlawful alien	36	0.8%
Other reasons <sup>a</sup>	21	0.4%

Note: Totals may not sum to 100% due to rounding.

<sup>a</sup>The category "other reasons" is compiled from four other prohibiting categories utilized by the DENI Branch to refer denials for field investigation.

**Table C. 2010 NICS denial cases involving unlawful firearm possession**

Outcome of ATF investigation	Delayed	Standard	All Cases	Percent
Total	1,858	65	1,923	100.0%
Retrieval of a firearm <sup>a</sup> by:				
Transfer to third party	573	4	577	30.0%
Return to firearms dealer	503	2	505	26.3%
Seizure by ATF	46	1	47	2.4%
Abandonment by transferee	35	0	35	1.8%
	1,157	7	1,164	60.5%
Subject not prohibited	498	11	509	26.5%
Unable to locate subject	128	0	128	6.7%
Firearm not transferred	43	46	89	4.6%
Given to local law enforcement	20	0	20	1.0%
Referred to other agency	12	1	13	0.7%

<sup>a</sup>A total of 1,181 firearms were retrieved by ATF, 1,174 from delayed denial cases and seven from standard denials cases.

**Table D. 2010 NICS denial cases declined by ATF field offices**

Reason for case declination	Delayed	Standard	All cases	Percent
Total	2,063	2,121	4,184	100.0%
No prosecutive merit	748	913	1,661	39.7%
Federal or State guidelines not met	527	565	1,092	26.1%
Not a prohibited person	409	71	480	11.5%
Closed by supervisor	210	247	457	10.9%
No potential or unfounded	159	237	396	9.5%
Referred to another agency	6	85	91	2.2%
Assisted prosecution	4	3	7	0.2%

Note: The number of cases declined is obtained from NForce. On occasion, a field office will close a case initially transferred from the DENI Branch and open the case under a different number; therefore the number of prosecuted cases may seem low compared to the number of cases referred to the field.

**Table E. Charges in 2010 NICS denial cases referred for prosecution**

18 USC 922 Subsection		Charge definition	Delayed	Standard	All charges <sup>a</sup>	Percent
Total <sup>b</sup>			49	13	62	100.0%
(a)(6)		Falsified information when buying firearms	15	7	22	35.5%
(g)(1)		Possession of firearm by convicted felon	8	3	11	17.7%
(g)(9)		Possession of firearm after domestic abuse charge	7	0	7	11.3%
(n)		Receive/ship/transport firearm after indictment	5	0	5	8.1%
(g)(3)		Possession of firearm by drug user	2	0	2	3.2%
(g)(8)		Possession of firearm while under restraining order	0	1	1	1.6%
Other			1	0	1	1.6%
Total 18 USC 922			38	11	49	79.0%
Other statutes <sup>c</sup>			11	2	13	21.0%

<sup>a</sup>Charges were referred against 33 persons, 25 from delayed denials and eight from standard denials.

<sup>b</sup>Seven charges were for State offenses; the remainder were Federal charges.

<sup>c</sup>Includes five charges for causing a firearms dealer to falsify records, 18 USC 924(a)(1)(A), one charge for making a false statement, 18 USC 1001, two state narcotics charges, and five charges based on unspecified state statutes.

**Table F. Judicial status of charges in 2010 NICS denial cases referred for prosecution**

Judicial status (as of December 13, 2011)	Delayed	Standard	All charges	Percent
Total	49	13	62	100.0%
Declined by prosecutor	13	5	18	29.0%
Guilty plea by defendant	11	2	13	21.0%
Pending action by prosecutor	12	0	12	19.4%
Dismissed per plea agreement	9	1	10	16.1%
Complaint filed	2	2	4	6.5%
Dismissed prior to indictment	2	1	3	4.8%
Dismissed after indictment	0	2	2	3.2%

**Table G. Charges in guilty pleas and verdicts, 2010 NICS denial cases**

18 USC 922 Subsection	Charge definition	Delayed	Standard	All charges <sup>a</sup>	Percent
	Total <sup>b</sup>	11	2	13	100.0%
(g)(1)	Possession of firearm by convicted felon	4	2	6	46.2%
(n)	Receive/ship/transport firearm after indictment	2	0	2	15.4%
(a)(6)	Falsified information when buying firearms	1	0	1	7.7%
(g)(3)	Possession of firearm by drug user	1	0	1	7.7%
	Total 18 USC 922	8	2	10	76.9%
	Other statutes	3	0	3	23.1%

<sup>a</sup>13 defendants pled guilty, 11 from delayed denials and two from standard denials.

<sup>b</sup>Three charges were for State offenses; the remainder were Federal charges.

**Table H. Federal judicial district summary, 2010 NICS denial cases**

## Districts with the most unlawful possession cases

Arizona	154
Texas Southern	86
Georgia Northern	81
Missouri Western	80
Kansas	79

## Districts with the most case declinations

Arizona	240
Kentucky Eastern	192
Kentucky Western	161
South Carolina	158
Missouri Western	152

## Districts with the most charges referred for prosecution

Indiana Northern	12
Arizona	6
Indiana Southern	6
Georgia Middle	5
New York Northern	5

## Districts with the most charges that resulted in a guilty plea

Indiana Northern	5
Indiana Southern	3
Arkansas Eastern	1
Georgia Middle	1
Kentucky Western	1
New York Northern	1
South Dakota	1

---

**Table I. Selected statistics on NICS denial cases, 2006-2010**

	Number of Cases					Change
	2010	2009 <sup>a</sup>	2008 <sup>b</sup>	2007 <sup>c</sup>	2006 <sup>d</sup>	2006-2010
FBI denials referred to DENI Branch	76,142	71,010	78,906	73,992	77,233	-1.4%
DENI referrals to ATF field divisions	4,732	4,681	5,573	6,275	9,432	-49.8%
Unlawful possession investigations	1,923	2,063	2,154	2,212	2,600	-26.0%
Investigations with firearm retrieved	1,164	1,256	1,218	1,258	1,480	-21.4%
Field office declinations	4,184	4,726	6,086	6,072	9,410	-55.5%
	Number of Charges					Change
	2010	2009	2008	2007	2006	2006-2010
Referred for prosecution	62	140	147	196	273	-77.3%
Declined by prosecutor <sup>e</sup>	18	63	42	74	99	-81.8%
Guilty plea or verdict <sup>e</sup>	13	32	43	48	73	-82.2%

<sup>a</sup>*Enforcement of the Brady Act, 2009*, (NCJ No. 234173, April 2011), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=256112>

<sup>b</sup>*Enforcement of the Brady Act, 2008*, (NCJ No. 231052, June 2010), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=253101>

<sup>c</sup>*Enforcement of the Brady Act, 2007*, (NCJ No. 227604, July 2009), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=249609>

<sup>d</sup>*Enforcement of the Brady Act, 2006*, (NCJ No. 222474, April 2008), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=244375>

<sup>e</sup>Counts for each year may be undercounted because some cases were pending action by a prosecutor or a court on the date that data was extracted from ATF records (see yearly reports for details). Results of the pending cases are not available for any year.

**Table J. Investigations of Pennsylvania POC Denial Cases, 2006-2010**

	2010	2009	2008	2007	2006	Change 2006-2010
Total denials	10,596	9,449	10,823	7,420	9,535	11.1%
Referred for investigation	441	328	504	440	285	54.7%
State police troops	382	222	294	300	175	118.3%
Local police departments <sup>a</sup>	59	96	90	139	102	-42.2%
ATF field offices	0	10	120	1	8	-100.0%
Investigation outcomes						
Firearms retrieved	---	---	---	---	---	---
Wanted persons apprehended	114	114	112	124	119	-4.2%
Arrests reported	205	215	96	252	194	5.7%
Prosecutor declinations	78	74	41	76	100	-22.0%
Convictions	129	151	69	181	173	-25.4%

---Not applicable or not available

Source: Pennsylvania State Police, Firearms Annual Reports, 2006-2010,  
<http://www.portal.state.pa.us/portal/server.pt?open=512&objID=4451&&PageID=462425&level=2&css=L2&mode=2>

<sup>a</sup>Pennsylvania cases were initially referred to state police troops and further referred to local police departments.

**Table K. Investigations of Virginia POC Denial Cases, 2006-2010**

	2010	2009	2008	2007	2006	Change 2006-2010
Total denials	2,999	3,101	2,777	2,222	2,380	26.0%
Referred for investigation	942	1,286	891	935	1,005	-6.3%
State police troops	942	1,286	891	935	1,005	-6.3%
Local police departments <sup>c</sup>	---	---	---	---	---	---
ATF field offices	---	---	---	---	---	---
Investigation outcomes						
Firearms retrieved <sup>a</sup>	6	6	11	5	---	---
Wanted persons apprehended	65	74	77	75	---	---
Arrests reported	846	930	810	716	727	16.4%
Prosecutor declinations	---	---	---	---	---	---
Convictions	---	---	---	---	---	---

---Not applicable or not available

<sup>a</sup>Includes firearms retrieved by the state police or returned voluntarily by a prohibited person.

Source: Virginia State Police.

# **EXHIBIT 42**




**From:** [REDACTED]  
**Sent:** Friday, March 16, 2018 3:11 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: 811365 California AB60 IDs and Real ID Act [IWOV-Interwoven.FID44801]

Yes, I believe that resolves the issue. Thank you for your quick reply.

When do you expect to rescind the June 30, 2016 letter concerning "federal limits apply" licenses? Will there be additional information or comment issued when this is done? The problems that we're currently having with California Department of Justice appear to be based on them continuing to rely on that letter.

Under *California law*, there should be no issues with firearm dealers accepting licenses with or without "federal limits apply" on them. This is certainly not an issue that concerns you and one we will take up with them.

But California DOJ appears to still focus on the June 30, 2016 letter and a belief that firearm dealers cannot accept any license that states "Federal Limits Apply" on it.

	<p>Direct: [REDACTED] Main: (562) 216-4444 Fax: (562) 216-4445 Email: [REDACTED] Web: <a href="http://www.michellawyers.com">www.michellawyers.com</a></p> <p>180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
--	---

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**From:** [REDACTED]  
**Sent:** Friday, March 16, 2018 3:57 AM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: 811365 California AB60 IDs and Real ID Act [IWOV-Interwoven.FID44801]

As a follow-up to our response, you are asking if it is correct to presume that dealers can accept post-January 22, 2018 licenses as identification for firearm purchases, provided the person checks the boxes to question 12 of the 4473 to reflect that they 1) are a U.S. citizen, 2) have not renounced their U.S. citizenship, and 3) are not an alien illegally or unlawfully in the country, *and* the dealer does not have reason to believe that the person is prohibited and/or illegally in the country.

Licensees may accept post-January 22, 2018 licenses/identification documents that meet the definition in [18 U.S.C. 1028\(d\)](#) in fulfilling their requirements under [18 U.S.C. 922\(t\)\(1\)\(C\)](#) and [27 CFR](#)

478.124(c)(3)(i). However, licensees may consider asking for additional documentation (e.g., passport) so that the transfer is not further delayed.

We trust the foregoing has been responsive to your inquiry. Should you have additional questions, please contact us at [REDACTED].

Regards,

[REDACTED] | Firearms Enforcement Specialist  
U.S. Department of Justice | Bureau of Alcohol, Tobacco, Firearms and Explosives

Firearms Industry Programs Branch  
99 New York Avenue NE, Mail Stop 6.N-518  
Washington, DC 20226



*To the extent that this electronic communication contains case-related information, it is only a summary or excerpt and is not intended to be a complete statement of facts or a formal report.*

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---

**From:** [REDACTED]  
**Sent:** Wednesday, March 14, 2018 3:27 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: 811365 California AB60 IDs and Real ID Act [IWOV-Interwoven.FID44801]

Thank you for your attention in this matter.

A point of clarification: Because it is "unclear whether persons who possess California DL/IDs issued with the endorsement "Federal Limits Apply" after January 22, 2018 are prohibited," is it a correct presumption that dealers can accept the post-January 22, 2018, licenses as identification for firearm purchases provided the person checks the boxes to question 12 of the 4473 to reflect 1) that they are a U.S. citizen, 2) have not renounced their U.S. citizenship, and 3) are not an alien illegally or unlawfully in the country, *and* the dealer does not have reason to believe that the person is prohibited and/or illegally in the country?

Once we have this cleared up we will be contacting DOJ.

Thanks  
[REDACTED]

**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 MATTHEW D. CUBEIRO IN SUPPORT OF  
PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION  
TO MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on August 12, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards  
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*Attorneys for Defendant Attorney General  
Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 12, 2019, at Long Beach, CA.

*s/ Laura Palmerin*  
Laura Palmerin

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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

**PLAINTIFFS' REPLY TO  
DEFENDANT'S OPPOSITION TO  
MOTION FOR PRELIMINARY  
INJUNCTION**

Hearing Date: August 19, 2019  
Hearing Time: 10:30 a.m.  
Courtroom: 5A  
Judge: Hon. Roger T. Benitez

[Filed concurrently with Declaration of  
Matthew D. Cubeiro]

## ARGUMENT

### I. Plaintiffs Have Standing to Challenge the System on Its Face

The State argues that the Individual Plaintiffs lack standing to challenge the System’s “purported burdens” because none of them has alleged to have experienced those burdens. Opp’n 17-18. The State is wrong. An individual whose right to acquire ammunition is affected by burdens imposed on vendors has standing to challenge those burdens. *See Jackson v. City & Cty. of San Francisco*, 829 F. Supp. 2d 867, 872 n. 3; *Doe v. Bolton*, 410 U.S. 179, 186 (1973) (holding that a woman had standing to challenge abortion statute because it “deterred hospitals and doctors from performing abortions,” limiting access to the right). In any event, CRPA has standing to sue on its members’ behalf, and that is enough. *See, e.g., Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 264 & n. 9. As alleged in the FAC, “CRPA represents the interests of those who are affected by the” scheme, and California’s “purchaser authorizations requirements severely burden the purchase, sale, and transfer of ammunition by overburdening consumers.” FAC ¶¶ 22, 75. CRPA’s declaration explains how those burdens have affected its members in practice. Travis Decl. ¶¶ 4-14.

The State is also wrong that Plaintiffs’ facial challenge fails because they cannot establish that “ ‘no set of circumstances exists under which [the regulation or statute] would be valid’ ” because “tens of thousands of ammunition transactions were processed in July alone.” Opp’n 17 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Setting aside that the *Salerno* standard has long been hotly debated and rarely applied,<sup>1</sup> the State’s application of it here is misplaced. Following the State’s logic, even a flat ban on firearms could not be struck on its face because there will always be a class of persons who cannot legally possess firearms to whom the law would be validly applied. So the

<sup>1</sup> *Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (rejecting view that “plaintiff must establish that no set of circumstances exists under which the Act would be valid”); *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Stevens, J., conc.) (“I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself.”)

question is not whether anyone can clear the many hurdles the System places in the way of the right to obtain ammunition. Instead, it is whether the State can demand that purchasers submit to a system that undisputedly (1) wrongfully denies nearly 18% of all purchasers, (2) rejects the State's standard-issued ID, and (3) causes undue delays that may put vendors out of business, eliminating the source of ammunition necessary to exercise the right to armed self-defense. *See* Mot. 8-10; Opp'n 16, 21. Under "no set of circumstances" could such a scheme be valid. *Salerno*, 481 U.S. at 745. What's more, in other rights contexts, a facial challenge will stand regardless of a law's "plainly legitimate sweep," if a "substantial number" of the law's applications are invalid. *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 n.6 (2008).

## **II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims that California's Ammunition Scheme Violates the Second Amendment**

### **A. California's Ammunition Scheme Implicates the Second Amendment**

According to the State, its scheme is immune from Second Amendment scrutiny because it is one of those "laws imposing conditions or qualifications on the commercial sale of arms" that the Supreme Court described as "presumptively lawful." Opp'n 12. But the Ninth Circuit has already said not only that the Second Amendment protects the acquisition of ammunition, but also that "*Heller* does not include ammunition regulations in the list of 'presumptively lawful' regulations." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014). In all events, whatever the Supreme Court intended to be a "presumptively lawful" commercial sales regulation, it certainly did not have in mind a law that could deny substantial numbers of people their rights.

### **B. California's Ammunition Scheme Fails Heightened Scrutiny**

First, contrary to the State's claim, Plaintiffs do not concede that intermediate scrutiny applies. Opp'n 13, n.4. Instead, Plaintiffs expressly state that strict scrutiny should apply because the System imposes the severe burden of denying many non-prohibited-persons access to ammunition, without which they cannot exercise their core right to armed self-defense at all, even within their homes. Mot. 13. Plaintiffs focus on the

intermediate scrutiny analysis in greater depth because the State cannot meet its burden even under that lower standard. Mot. 13.

In describing its burden under intermediate scrutiny, the State relies almost exclusively on Second Amendment cases from the Ninth Circuit. It does not address the Supreme Court’s articulation of intermediate scrutiny that Plaintiffs lay out in their motion—that the State bears the burden of proving *both* that the System is “substantially related” to an important interest and “closely drawn” to achieve that end. Mot. 13 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014)). When the State is held to these burdens, it cannot meet either.

**1. California’s ammunition scheme is not “substantially related” to any public safety interest.**

For a law to be substantially related to the government’s interests, the government must prove that its “restriction will in fact alleviate” its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). It is not enough for the government to rely on “mere speculation or conjecture.” *Id.* Plaintiffs do not dispute that keeping weapons away from dangerous people is a substantial public safety interest. Opp’n 15. They do, however, dispute that California’s scheme substantially furthers that interest.

First, the State touts the experiences of Los Angeles and Sacramento in monitoring ammunition purchases as evidence that its system works. Opp’n 15. But neither of those systems rejects FLA IDs or requires a background check to purchase ammunition—let alone one that denies about one of every six eligible purchasers. L.A., Cal., Mun. Code § 55.11; Sacramento, Cal., City Code §§ 5.66, 5.66.020, 5.66.040. So neither supports the State’s claim that it has a substantial interest in rejecting an FLA ID or requiring a background check so susceptible to improperly rejecting lawful purchasers.

In evaluating whether the State’s System “will in fact alleviate” its concerns, a more apt comparison is to *the State’s* firearm background check system. A study funded by the University of California Firearm Violence Research Center—created by the California Legislature—determined that comprehensive background check requirements were “not



associated with significant and specific changes in rates of fatal firearm violence.” Cubeiro Decl., Ex. 40 at 53. Specifically, the study concluded that implementation of these requirements “did not result in population-level changes in the rates of firearm-related homicides and suicides in California.” *Id.*, Ex. 40 at 55. The State offers only speculation that its ammunition background check system would fare any better.

Contrary to the state-funded study, the State claims that it knows background checks work because background checks stopped 82,000 prohibited persons from making firearm purchases in 2012 alone. Opp’n 5, 16 (citing Prop. 63 §§ 2.6-2.7). The State cites no evidence for this claim. It is nothing more than a talking point. Evidence does show, however, that while the federal check resulted in 76,152 *initial* denials in 2010, about 94% were dropped at the first stage of review by BATF. Cubeiro Decl., Ex. 41 at 6, tbl. 2 (93.8% of denials did not meet referral guidelines, were overturned or cancelled).

Finally, the State relies on a report from New Jersey about the problems of criminal ammunition acquisition. Opp’n 15. But New Jersey never implemented an ammunition scheme even remotely similar to California’s in response to that report. Indeed, no other state has. The State argues that the lack of similar laws is not the standard for proving that a law is substantially related to a government interest. Opp’n 15. But Plaintiffs never claim that it is. Instead, they argue that the dearth of such laws reveals their lack of utility or, at least, infeasibility.<sup>2</sup> Mot. 14 (quoting *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

In sum, while some ammunition laws may be substantially related to the government’s interest in public safety, *this* scheme is not.

## **2. California’s ammunition scheme lacks a reasonable “fit” with the State’s interest in preventing criminal misuse.**

In arguing that its scheme meets the “fit” requirement, the State boasts that the System prevented 106 prohibited persons from obtaining ammunition—of the 62,083

<sup>2</sup> The State ignores that New York scrapped its almost identical background check system, Mot. 14 & n.9.



people who tried to purchase ammunition in July—as well as the “large number” of prohibited persons who the State contends were likely dissuaded from even attempting purchase. Opp’n 16. But in assessing the proper “fit” under intermediate scrutiny, courts are not concerned with the purported benefits of a law. Instead, the concern is whether a law’s encroachment on constitutional rights is “not more extensive than necessary” to serve the government’s interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). Thus, the inquiry is only whether the government can meet its burden of proving that its law does not burden “substantially more” constitutionally protected conduct than “necessary to further [its important] interest.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). That is a burden the State cannot meet, based on its own evidence.

According to the State, over 18% of ammunition purchases were rejected in July. Opp’n 21. Among those rejections were about *11,000 non-prohibited persons*—nearly 100 times the number of prohibited persons the State claims the System ferreted out. Morales Decl. ¶¶ 49-52. Also included were about 1 of every 8 COE holders who attempted purchase, Morales Dec. ¶ 51, even though these people have taken extra steps with the State, including an extensive background check and fingerprinting, to establish that they are eligible to purchase *firearms*, Req. Jud. Notice, Ex. 32. While the State speculates that these people “may” be able to “quickly” remedy any issue that impedes their ability to purchase, it provides no specifics. Opp’n 21. Likely because it could not. Indeed, for many, the fix is not at all quick. Brady Decl., Ex. 35 at 5, n.10 (noting waiting times of 3-4 months to fix AFS records).<sup>3</sup> In short, the System wrongly and indefinitely denied *at least 10,000 legitimate purchasers* of their constitutional right to acquire ammunition. The “fit” could hardly be looser.

And this does not even account for the untold numbers of people who could not

<sup>3</sup> The State argues that Plaintiffs have not shown that these people were unable to eventually acquire ammunition. Opp’n 21. But Plaintiffs do not have access to the System, the State does! Yet it does not say whether any of those rejected could fix the issue and obtain ammunition, let alone that many did. *See* Opp’n 21; Morales Decl.

undergo a background check because they lacked the required documentation or would not submit to one for other reasons. *See* Bartel Decl. ¶¶ 10-11; Burwell Decl. ¶ 10; Dodd Decl. ¶ 12; Gray Decl. ¶¶ 10-11; Lowder Decl. ¶¶ 10-11; McNab Decl. ¶¶ 27- 30; Morgan Decl. ¶¶ 10-11; Ortiz Decl. ¶¶ 15-16; Puehse Decl. ¶¶ 12-13. The State does not dispute that it requires documentation beyond its standard-issued ID to purchase ammunition. Instead, it argues that Plaintiffs provide no evidence that the additional ID requirement has prevented anyone from acquiring ammunition and that the claim that it did is dubious because presenting acceptable identification is an “easy cure.” Opp’n 21.<sup>4</sup> While it may be an “easy cure” for someone who has the required records, the State ignores the burden that acquiring the documentation places on someone who does not. Mot. 10-11 (citing Dodd Decl. ¶¶ 7-12; Ortiz Decl. ¶ 17; Exs. 30-31).

In any event, the State simply cannot show that its additional ID requirement does not burden more constitutionally protected conduct than necessary. It bars anyone lacking ID beyond what the State issues as a default. Mot. 7 (citing Cal. Code Regs. tit. 11, § 4045.1). The State claims the requirement precludes “persons without lawful presence” in the country from acquiring ammunition. Opp’n 20. The irony that FLA IDs were created to accommodate those very people speaks volumes. Assemb. B. 60, 2013-2014 Reg. Sess. (Cal. 2013). But more telling is that the *only* thing *California* will not accept its standard-issued (FLA) ID for is purchasing firearms and ammunition. What’s more, the State does not (and cannot) dispute that the federal government accepts that same ID for *firearm* background checks, it merely quibbles about Plaintiffs’ citation. Opp’n 20-21, n.11; Cubeiro Decl., Exs. 38-39.<sup>5</sup> Finally, the State ignores the problem that non-residents cannot purchase ammunition without a COE, which takes weeks and more than \$71 in

<sup>4</sup> The State finds it sound to assume that the System dissuaded countless prohibited persons from undergoing the background check but demands evidence that some non-prohibited persons refused to proceed for other reasons. Opp’n 21, 24.

<sup>5</sup> The State also suggests that its ID requirement is reasonable because NRA advised firearm vendors to request additional documentation for purchasers with FLA licenses. Opp’n 9. But NRA was doing so only to protect those vendors from legal trouble because the State was wrongfully citing those vendors who did not do so. Cubeiro Decl. ¶¶ 2-9.

fees to obtain. Mot. 6-7.

As for the longer processing time for ammunition transactions, the State misses the point. While the extra wait itself may be constitutionally problematic—given all the other hurdles firearm owners must overcome merely to exercise their rights—that is not Plaintiffs’ main concern. Instead, they argue that the delays are completely (or mostly) avoidable and that the System unreasonably causes these delays. What’s more, the State understates the wait by focusing only on the time between when the vendor “clicks the delivery button” and when DOJ processes a background check request. Opp’n 19. There is additional time both preceding that process (helping customers locate ammunition, explaining background check options, uploading personal information) and following it (print and sign copies of transaction). This extra time could be easily avoided. As could the extra time and cost of collecting records about the type and amount of ammunition sold, which have been found to lack any law enforcement value, Mot. 16; particularly for vendors to print and store them.

Finally, stating that there is no Second Amendment right to sell arms, the State discounts Vendors’ complaints that the requirements are so burdensome that they could mean closing shop. Opp’n 22. But the State misses the point. It is not the Vendors who are asserting a right here. Instead, Plaintiffs are sharing these stories because the burdens on Vendors, as the purveyors of Second Amendment rights, affect Plaintiffs’ ability to exercise their rights. *See Jackson*, 829 F. Supp. 2d at 872 n.3; *Doe*, 410 U.S. at 186.

### **III. Plaintiffs Are Likely to Succeed on Their Dormant Commerce Clause Claim**

The State ignores Plaintiffs’ argument that the ammunition scheme regulates extraterritorially and is invalid *per se*. Mot. 21-22. Plaintiffs should thus prevail on this claim. In any event, because California’s scheme “directly discriminate[s] against out-of-state entities,” it “can survive only if the state demonstrates both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.” *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 736 (9th Cir. 2017), *cert. denied sub nom., Nationwide Biweekly Admin., Inc. v. Hubanks*, 138

S. Ct. 1698 (2018) (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). The State does not even attempt to make that showing. Instead, it argues that its scheme is not discriminatory because Vendors cannot *ship* ammunition directly to consumers either. Opp’n 22. But that is not the relevant inquiry.

The State does not dispute Plaintiffs’ claims that Vendors may legally refuse to process third-party ammunition transfers, or that Vendors are, in fact, doing just that. Mot. 21 (citing Brady Decl. ¶¶ 8-9; Gilhousen Decl. ¶¶ 3-4; Wolgin Decl. ¶ 9). Nor does the State deny Plaintiffs’ claim that a Vendor willing to process such a transaction may charge the purchaser any fee amount it wishes to do so. *Id.* In sum, in-state vendors have direct access to California consumers while out-of-state vendors do not. As this Court has already held “[w]hat is important is that California’s resident businesses are the only businesses that may sell directly to ammunition consumers.” Order Re: Defs.’ Mot. Dismiss 6 (citing *Nationwide*, 873 F.3d at 737). The State urges this Court to reconsider its reading of *Nationwide*, arguing that it only “held that making incorporation under California law a prerequisite to obtain a state-issued license likely violated the Dormant Commerce Clause,” and because California’s scheme does not, the case is inapt. Opp’n 23. The Court should reject the State’s reading. *Nationwide* held that a statute requiring a business to incorporate in California violates the Commerce Clause because it “requires any corporation that wants to engage in a certain kind of business within the state to become a resident.” 873 F.3d at 736-37. The court was not concerned with the incorporation requirement per se, but that it required in-state residence. *Id.*, *see also* *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (“The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.”)

#### **IV. Plaintiffs Are Irreparably Harmed by the Violation of Their Rights**

Again, “the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’ ” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). So if the Court agrees that Plaintiffs are likely to succeed on the merits, preliminary relief is proper. The State’s rebuttal is unpersuasive.

First, the State argues that Plaintiffs have not established irreparable harm because, unlike in the First Amendment context where “deprivation even from [sic] minimal periods of time constitutes irreparable injury,” the deprivation of other fundamental rights apparently requires more. Opp’n at 23 (citing *Constructors Ass’n of W. Penn. v. Kreps*, 573 F.2d 811, 820 n.33 (3d Cir. 1978)). Because, according to the State, the Individual Plaintiffs can eventually purchase ammunition, there is no harm. But the State cites no Second Amendment case in which the court chose to treat the right differently from the First for purposes of finding irreparable harm. And it ignores those cases in which courts, including this one, have treated the deprivation of Second Amendment rights as irreparable. *See, e.g., Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. 2017).<sup>6</sup>

The State’s citation of *Constructors Association* hardly helps its cause. As the State itself quotes, the court there recognized that the denial of “equal protections rights may be more less serious depending on the other injuries which accompany such deprivation.” Opp’n at 23 (quoting *Constructors*, 573 F.2d at 820 n.33). Here, the “other injuries” are no doubt severe—indeed, deprivation of access to ammunition could be deadly. As this Court held when it granted a preliminary injunction in *Duncan*, “ ‘[t]he right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary.’ . . . Loss of that peace of mind, the physical magazines, and the enjoyment of Second Amendment rights constitutes irreparable injury.” 265 F. Supp. 3d at 1135 (quoting *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016)).

Second, the State claims that “Plaintiffs cannot establish irreparable harm under a dormant Commerce Clause theory because the law . . . has been in effect for over a year-and-a-half.” Opp’n at 23-24. But, as the State obliquely admits, Opp’n at 24, “delay” in bringing a motion for preliminary injunction is merely “a factor to be considered,” *Lydo*

<sup>6</sup> The State chooses to focus on the mere “minutes” it claims have been added to ammunition transactions. Opp’n 23. But it ignores the scenarios in which non-prohibited persons are being wrongly denied access to ammunition indefinitely. Mot. 9-10.

*Enterps., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Indeed, the Ninth Circuit held that it “would be loath to withhold relief solely on that ground.” *Id.* at 1214 (noting that a five-year delay weakened claim of irreparable harm but was not dispositive). Here, the laws’ effects changed dramatically when the State implemented its regulations last month, and the violation of Plaintiffs’ constitutional rights worsened. The Court should not treat Plaintiffs’ purported delay, alone, as reason to deny preliminary relief.

#### **V. The Balance of Harms and the Public Interest Tip in Plaintiffs’ Favor**

As for the balance of harms and public interest factors, the State complains that it “suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.” Opp’n 25 (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). That purported harm, however, cannot overcome the severe harm that the State’s likely unconstitutional ammunition scheme imposes. To be sure, the Court should not exercise its authority to enjoin a “duly enacted” law lightly, but if a law violates the constitutional rights of the People, the Court properly enjoins it. *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004); *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

In their facial challenge, Plaintiffs object to a scheme that improperly denies thousands of people their right to acquire ammunition necessary for armed self-defense. The State speculates, but has not proved, that those thousands of people can take “minor steps” to overcome this violation of their rights. Opp’n 24. While preventing 106 prohibited persons from acquiring ammunition is a public good, Opp’n 24, when weighed against the (potentially deadly) harm of indefinitely denying access to thousands of *non*-prohibited persons, the balance of harms tips sharply in Plaintiffs’ favor.

#### **CONCLUSION**

For these reasons, Plaintiffs ask the Court to issue a preliminary injunction.

Dated: August 12, 2019

**MICHEL & ASSOCIATES, P.C.**

s/ Sean A. Brady

Sean A. Brady

Email: sbrady@michellawyers.com

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:

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO  
MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on August 12, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

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*Attorneys for Defendant Attorney General  
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I declare under penalty of perjury that the foregoing is true and correct. Executed August 12, 2019, at Long Beach, CA.

*s/ Laura Palmerin*  
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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

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

Hearing Date: August 19, 2019  
Hearing Time: 10:30 a.m.  
Courtroom: 5A  
Judge: Hon. Roger T.  
Benitez



1 Everytown for Gun Safety Support Fund (“Everytown”) respectfully moves  
2 for leave to file an *amicus curiae* brief in the above-captioned matter. Plaintiffs and  
3 Defendant have been notified of Everytown’s request to file an *amicus curiae* brief,  
4 and all parties consent to Everytown’s request, which is being filed prior to the  
5 Plaintiffs’ August 12, 2019 filing deadline for their Reply Brief to Defendant’s  
6 Opposition. (ECF No. 32-1).

7 Amicus curiae Everytown for Gun Safety Support Fund is the education,  
8 research, and litigation arm of Everytown for Gun Safety, the nation’s largest gun-  
9 violence-prevention organization. Everytown has over five million supporters across  
10 all fifty states, including tens of thousands in California. It was founded in 2014 as  
11 the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition  
12 of mayors combating illegal guns and gun trafficking, and Moms Demand Action for  
13 Gun Sense in America, an organization formed after twenty children and six adults  
14 were murdered by a gunman with an AR-15 rifle in an elementary school in  
15 Newtown, Connecticut. The mayors of more than fifty California cities are members  
16 of Mayors Against Illegal Guns. Everytown also includes a large network of gun-  
17 violence survivors who are empowered to share their stories and advocate for  
18 responsible gun laws.

19 The Ninth Circuit and California District Courts have “broad discretion to  
20 appoint amici curiae.” *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)  
21 *abrogated on other grounds by Rainwater v. McGinness*, 559 F. App’x 635, 635 (9th  
22 Cir. 2014); *see also Duronslet v. Cty. of Los Angeles*, No. 2:16-cv-08933-  
23 ODW(PLAx), 2017 WL 5643144, \*1 (C.D. Cal. Jan. 23, 2017). Courts “frequently  
24 welcome amicus briefs from nonparties concerning legal issues that have potential  
25 ramifications beyond the parties directly involved or if the amicus has unique  
26 information or perspective that can help the court beyond the help that the lawyers  
27 for the parties are able to provide.” *Safari Club Int’l v. Harris*, No. 2:14-cv-01856-  
28 GEB-AC, 2015 WL 1255491, at \*1 (E.D. Cal. Jan. 14, 2015) (citation omitted).

1 “Even when a party is very well represented, an amicus may provide important  
 2 assistance to the court.” *Duronslet*, at \*1 (quoting *Neonatology Assocs., P.A. v.*  
 3 *C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002)).

4 Over the past several years, Everytown has devoted substantial resources to  
 5 researching historical firearms legislation that can provide this Court with important  
 6 context directly relevant to the California statute at issue. Indeed, Everytown has  
 7 drawn on its expertise to file briefs in numerous Second Amendment cases, offering  
 8 historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*,  
 9 *Libertarian Party of Erie Cty. v. Cuomo*, No. 18-0386-cv (2d Cir.); *Colo. Outfitters*  
 10 *Ass’n v. Hickenlooper*, No. 14-1290 (10th Cir.); *Silvester v. Harris*, No. 14-16840  
 11 (9th Cir.).

12 The proposed amicus brief provides an account of the American tradition of  
 13 regulating the commercial sales of firearms, as well as a tradition of record-keeping  
 14 requirements for firearm sellers. This includes approximately a century of  
 15 restrictions enacted shortly after semi-automatic weapons capable of firing a large  
 16 number of rounds without reloading became widely available in the commercial  
 17 market. The brief documents the extensive historical support for firearms  
 18 regulations and thus provides foundational support for the long-held view that such  
 19 laws pass constitutional muster. The historical information in this brief bears on the  
 20 Court’s first step in its analysis of the Second Amendment claim on Plaintiffs’  
 21 Motion for Preliminary Injunction.

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 28 //

1           Given the relevance of this history and research to the question before the  
2 Court, Everytown respectfully requests that the Court grant leave to file the  
3 accompanying *amicus curiae* brief in support of Defendant's Opposition to  
4 Plaintiffs' Motion for Preliminary Injunction.

5 Dated: August 9, 2019

Respectfully submitted,

6  
7 By: /s/ Matthew J. Tako

Matthew E. Sloan

Matthew J. Tako

Evan G. Slovak

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KIM RHODE, *et al.*,

Plaintiffs,

vs.

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

Defendant.

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

**NOTICE OF MOTION AND  
MOTION FOR LEAVE TO  
PARTICIPATE AS *AMICI CURIAE***

Date: August 19, 2019  
Time: 10:30 am  
Dept.: 5A  
Judge: Hon. Roger T. Benitez

**TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF  
RECORD:**

PLEASE TAKE NOTICE that on August 19, 2019, at 10:30 a.m. in the above-titled court, movants Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) and Brady will, and hereby do, move for an order permitting them to participate as *amici curiae* in the above-captioned matter. In this matter, the Plaintiff’s Motion for Preliminary Injunction is currently scheduled to be heard at the above-referenced date, time, and location.

This motion is made on the grounds that the Court has inherent authority to allow the participation of an *amicus curiae*. Giffords Law Center and Brady’s participation as *amici curiae* would be helpful and desirable as it would facilitate a more complete understanding of the issues before the Court. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and all attachments thereto, all papers and pleadings on file in this action, and upon such further evidence and argument as may be presented to the Court in connection with the motion.

DATED: August 9, 2019

DAVIS WRIGHT TREMAINE LLP  
THOMAS R. BURKE

By: /s/ Thomas R. Burke  
Thomas R. Burke  
Attorneys for *Amici Curiae*  
The Giffords Law Center to Prevent  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

<p><b>KIM RHODE et al.,</b></p> <p>Plaintiffs,</p> <p><b>v.</b></p> <p><b>XAVIER BECERRA, in his official capacity as Attorney General of the State of California, et al.,</b></p> <p>Defendants.</p>	<p>3:18-cv-00802-BEN-JLB</p> <p><b>REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; DECLARATION OF NELSON R. RICHARDS</b></p> <p>Date: August 19, 2019 Time: 10:30 a.m. Dept: 5A Judge: Hon. Roger T. Benitez Action Filed: 4/27/2018</p>
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## REQUEST FOR JUDICIAL NOTICE

Defendant Xavier Becerra, sued in his official capacity as the Attorney General of California, respectfully requests that this Court take judicial notice, pursuant to Federal Rule of Evidence 201(c)(2), of the documents attached to the accompanying declaration of counsel:

- **Exhibit 1** is a journal article, Tita et al., *The Criminal Purchase of Firearm Ammunition*, 12 Injury Prevention 308, 309 (2006).
- **Exhibit 2** is an August 12, 2008 Staff Report to the Council of the City of Sacramento titled “Presentation: Ammunition Sales Records Study.”
- **Exhibit 3** is the New Jersey State Commission on Investigation’s February 2007 report titled *Armed and Dangerous: Guns, Gangs and Easy Access to Firearms Ammunition in New Jersey*.
- **Exhibit 4** is the November 20, 2018 guidance issued by the California Department of Justice titled “California Department of Justice Update Regarding the Use of ‘Federal Limits Apply’ Driver Licenses and Identification Cards to Purchase Firearms.”
- **Exhibit 5** is the November 20, 2018 consumer alert issued by the California Department of Justice titled “Consumer Alert Regarding the Use of ‘Federal Limits Apply’ Driver Licenses and Identification Cards to Purchase Firearms.”
- **Exhibit 6** to this request is a true and correct copy of a November 20, 2018 press release titled “California Department of Justice Issues Consumer Alert on the Use of ‘Federal Limits Apply’ Driver Licenses and IDs to Purchase Firearms.”

Federal Rule of Evidence 201(b) provides that a judicially noticed fact must be one “not subject to reasonable dispute” because it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be readily

questioned. Fed. R. Evid. 201(b). “Under Rule 201, the court can take judicial notice of public records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies.” *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015) (quotation marks and brackets omitted). Exhibits 2 through 6 are thus judicially noticeable because they are copies of government records or documents that are available from reliable sources on the Internet.

In the context of a constitutional challenge to a law under the intermediate scrutiny standard, this Court may consider studies that lawmakers could have relied upon. *See, e.g., Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (“When reviewing the reasonable fit between the government’s stated objective and the regulation at issue, the court may consider the legislative history of the enactment as well as studies in the record or cited in pertinent case law.” (quotation marks omitted)). This Court may thus consider Exhibit 1 as well.

In the alternative, Exhibits 1 through 3 are legislative facts, which this Court may consider. *See* Fed. R. Evid. 201 advisory committee notes to subdivision (a) (1972) (explaining that legislative facts “are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body,” and that no rule deals with judicial notice of those facts). “Judicial notice of legislative facts . . . is unnecessary.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009).



Dated: August 5, 2019

Respectfully Submitted,

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

/s/ Nelson Richards  
NELSON R. RICHARDS  
P. PATTY LI  
Deputy Attorneys General  
*Attorneys for Defendant Attorney  
General Xavier Becerra*

## DECLARATION OF NELSON R. RICHARDS

I, NELSON R. RICHARDS, declare:

1. I am a Deputy Attorney General with the California Department of Justice, Office of the Attorney General, and an attorney for Defendant Xavier Becerra, Attorney General of California, in this matter. I am an attorney at law duly licensed to practice before all courts of the State of California and admitted to practice before the United States District Court for the Southern District of California. I have personal knowledge of the facts set forth below and if called as a witness, I could and would competently testify to them.

2. This declaration is made in support of Defendant Xavier Becerra's opposition to Plaintiffs' motion for preliminary injunction.

3. Exhibit 1 to this request and declaration is a true and correct copy of Tita et al., *The Criminal Purchase of Firearm Ammunition*, 12 Injury Prevention 308, 309 (2006). I obtained a copy of this journal article from the website of the U.S. National Library of Medicine, National Institute of Health at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563465/>.

4. Exhibit 2 to this request and declaration is a true and correct copy of the August 12, 2008 Staff Report to the Council of the City of Sacramento titled "Presentation: Ammunition Sales Records Study." I obtained a copy of this document from the City of Sacramento's website at: [https://sacramento.granicus.com/MetaViewer.php?view\\_id=22&clip\\_id=1590&meta\\_id=155275](https://sacramento.granicus.com/MetaViewer.php?view_id=22&clip_id=1590&meta_id=155275).

5. Exhibit 3 to this request and declaration is a true and correct copy of the New Jersey State Commission on Investigation's February 2007 report titled *Armed and Dangerous: Guns, Gangs and Easy Access to Firearms Ammunition in New Jersey*. I obtained a copy of this document from the Commission's website at: <https://www.state.nj.us/sci/pdf/Armed%20and%20Dangerous.pdf>.

6. Exhibit 4 to this request and declaration is a true and correct copy of the November 20, 2018 guidance issued by the California Department of Justice titled

“California Department of Justice Update Regarding the Use of ‘Federal Limits Apply’ Driver Licenses and Identification Cards to Purchase Firearms.” I obtained a copy of this document from records of the Attorney General’s Office, to which I have access.

7. Exhibit 5 to this request and declaration is a true and correct copy of the November 20, 2018 consumer alert issued by the California Department of Justice titled “Consumer Alert Regarding the Use of ‘Federal Limits Apply’ Driver Licenses and Identification Cards to Purchase Firearms.” I obtained a copy of this document from records of the Attorney General’s Office, to which I have access.

8. Exhibit 6 to this request is a true and correct copy of a November 20, 2018 press release titled “California Department of Justice Issues Consumer Alert on the Use of ‘Federal Limits Apply’ Driver Licenses and IDs to Purchase Firearms.” I obtained a copy of this document from records of the Attorney General’s Office, to which I have access.

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

Executed on: August 5, 2019

/s/ Nelson Richards  
NELSON R. RICHARDS  
Deputy Attorney General

# EXHIBIT 1

ORIGINAL ARTICLE

# The criminal purchase of firearm ammunition

G E Tita, A A Braga, G Ridgeway, G L Pierce

*Injury Prevention* 2006;12:308–311. doi: 10.1136/ip.2006.013052

See end of article for authors' affiliations

Correspondence to: Professor G E Tita, University of California–Irvine, Criminology, Law, and Society, 2307 Social Ecology II, Irvine, CA 92697-7080, USA; gtita@uci.edu

Accepted 4 August 2006

**Objective:** Laws that prohibit certain individuals from owning firearms also pertain to ammunition. Whereas retail sales of firearms to criminals are regularly disrupted by instant background checks, sales of ammunition are essentially unchecked and the rate at which criminals acquire ammunition is unknown. This research describes the ammunition market and estimates the rate at which criminals are acquiring ammunition.

**Design:** Criminal background checks conducted on individuals purchasing ammunition in the City of Los Angeles in April and May 2004.

**Setting:** Los Angeles, CA, USA.

**Subjects:** Ammunition purchasers.

**Main outcome measures:** Criminal activity that prohibits one from owning, purchasing, or possessing ammunition.

**Results:** 2.6% (95% CI 1.9% to 3.2%) of ammunition purchasers had a prior felony conviction or another condition that prohibited them from possessing ammunition. During the study period prohibited possessors purchased 10 050 rounds of ammunition in Los Angeles.

**Conclusions:** These estimates suggest that monitoring ammunition transactions may help reduce the supply of ammunition to criminals and the frequency of injuries from felonious gun assaults. Such a record can also provide information for generating leads on illegal firearm possession.

From 1993–96, emergency rooms in the United States treated an estimated 413 186 incidents of non-fatal firearm injuries stemming from causes ranging from gunshot wounds, injuries sustained while trying to elude gunfire, lacerations from recoil, and being struck by a firearm.<sup>1</sup> Over this period, an estimated 7630 people were treated annually for injuries resulting from purposefully being *struck by a gun*. This number, however, pales in comparison to the nearly 87 000 injuries caused by being *struck by a bullet fired from a gun*. Clearly, guns without ammunition are much less dangerous than loaded ones and, besides the fear that guns induce, the unloaded gun is no more dangerous than any other blunt object. Unlike the public health view on drug policy, which recognizes the importance of limiting access to both the agent of harm (the narcotic) and the instrument of delivery (for example, syringe), gun policy has focused primarily on limiting access to the instrument of delivery, firearms, while eschewing efforts to limit access to ammunition, the actual agent of harm.

Gun violence has decreased over the past decade, yet many Americans still die by gunfire and, of course, many more are still affected by non-fatal gun violence. In 2004, there were 11 344 gun murders, 164 998 gun assaults, and 162 938 gun robberies.<sup>2</sup> In 2003, there were 16 907 suicides with firearms.<sup>3</sup> Advocates on all sides of the gun control debate in the United States agree that policies and interventions that make guns and ammunition less available to those who are prone to violence deserve high priority, will save lives, and reduce the burden of gun violence on society. One broad class of strategies is designed to limit access to different kinds of weapons by different kinds of people.<sup>4</sup> The basic policy idea is to restrict access to firearms and ammunition by the “bad guys” without denying access to the “good guys”.<sup>5</sup> Existing firearms regulations in the United States that prohibit certain individuals from purchasing or possessing a firearm also apply to the purchase and possession of ammunition. While there has been considerable policy action at the federal, state,

and local level to identify and screen out ineligible purchasers of firearms through criminal background checks, there has been little action to identify and screen out disqualified buyers from illegally acquiring ammunition. Most countries restrict certain individuals, such as violent offenders and those with certain mental illnesses, from possessing firearms but the United Nations Group of Experts notes that “measures to control small arms and light weapons would not be complete if they did not include ammunition and explosives”.<sup>6</sup> Clearly ammunition makes guns much more lethal. If gun-using criminals could be hindered from obtaining ammunition, it follows that gun violence may decline. Furthermore, recent research suggests that even within an urban center plagued by gun violence, guns are more readily available for purchase than ammunition.<sup>7</sup> This finding suggests that greater efforts to prevent criminal access to ammunition may be more effective in reducing firearm injury than further limiting access to firearms.

## REGULATING AMMUNITION SALES AND SCREENING AMMUNITION PURCHASERS

A number of nations as well as some US states currently require ammunition purchasers to have valid identification cards and/or firearms licenses. Proposed legislation in California (SB 357) would further require ammunition dealers in California to log all ammunition purchases and their purchasers in a state database. Although this bill failed in 2005, state law has not preempted city ordinances enacted in Los Angeles, San Francisco, Oakland, and several other California cities to regulate ammunition commerce. These statutes have tougher proof of identification standards (state issued identification card and the purchaser's fingerprint) and require the seller to retain documentation of all

**Abbreviations:** ATF, Bureau of Alcohol, Firearms, Tobacco and Explosives; DOJ, Department of Justice; FFL, Federal Firearms Licensee; LAPD, Los Angeles Police Department.

ammunition purchasers in a non-electronic “ammunition log”.

Underpinning these legislative efforts is the belief that prohibited possessors are currently purchasing ammunition at licensed dealers and could be prevented from doing so through criminal background checks and transaction records. Currently there is no direct research evidence to support this position and efforts against this legislation have pointed out this lack of evidence. The Citizens Committee for the Right to Keep and Bear Arms (CCRKBA) correctly noted following the defeat of SB 1152 that “there is *no existing data* to suggest that an ammunition purchase registry will have any positive impact on crime”<sup>8</sup> (authors’ italics). Similarly, the National Association of Firearms Retailers criticized the measure, noting that “no valid public safety purpose will be advanced by burdening our members in California with keeping a registry of perfectly legal ammunition sales and law-abiding ammunition purchasers. We are aware of *no scientifically valid study* that concludes an ammunition registry would be an effective law enforcement tool”<sup>8</sup> (authors’ italics).

As noted above, there is reason to believe that targeting retail ammunition sales will in fact impact levels of firearm injury. Recent ethnographic research on the workings of illegal guns markets in Chicago suggests that it was more difficult for criminals to acquire ammunition than guns.<sup>7</sup> Most youth reported trouble with securing ammunition and faced considerable price markups compared to the legal market. If it is true that for many criminals ammunition is scarce then effective screening procedures or transaction record keeping for ammunition purchases at retail outlets could be used to good effect in reducing an important supply line of ammunition.

In this study, we sought to learn more about the retail market in ammunition by examining bullet and shotgun shell purchases in the City of Los Angeles, which passed a city ordinance in 1998 requiring proof of identification and a thumbprint (55.11 LAMC). We examined the characteristics of sales conducted in the City of Los Angeles, California with a particular focus on the purchasers’ criminal history. We also explored the frequency in which prohibited possessors acquire ammunition from licensed dealers. Our results indicate that prohibited possessors acquired about 10 000 rounds of ammunition during the two month study period.

## DATA

These data were collected as part of a US Department of Justice (DOJ) funded study aimed at understanding and disrupting the illegal gun market serving criminals and youth in Los Angeles. Local ordinance requires every Federal Firearms Licensee (FFL) in Los Angeles that sells ammunition to maintain ammunition purchase logs on all transactions, which the Los Angeles Police Department (LAPD) Gun Unit periodically collects. The data recorded for each transaction are handwritten into the ammunition log and include purchaser-specific data, as well as purchase-specific information. Identifying information for each purchaser includes name, age, sex, date of birth, address, thumbprint, and a driver’s license/state issued identification number. Data also include the type and quantity of ammunition purchased along with the date for each transaction.

Our study uses ammunition log data to examine purchases made in the City of Los Angeles during the months of April and May 2004. During the study time period, there were only 15 FFLs in all of Los Angeles that sold ammunition: eight sporting goods stores, three firing ranges, two law enforcement facilities, one war surplus store, and one small business that reloads ammunition for sale. As part of the DOJ study, the LAPD Gun Unit collected the completed logs from 10 businesses and handed these records over to the Southern

California Regional Crime Gun Center operated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). We excluded the two law enforcement facilities because they sell only to law enforcement employees, who by definition cannot have a criminal background. Limited availability of LAPD officers for collecting the data on ammunition purchases during the study’s time period resulted in data not being collected from the ammunition reload business, one of the sporting goods stores, and one of the firing ranges. As such, these ammunition dealers were excluded from our analyses. ATF personnel computerized the data from the 10 remaining FFLs. For each transaction in the ammunition logs, ATF personnel checked whether the purchaser appeared in the National Criminal Information Center (NCIC) data or in the California Department of Justice’s Criminal History files. They recorded the full criminal histories of the complete sample of ammunition purchasers with criminal backgrounds.

Seven of the observed ammunition retailers are in the San Fernando Valley, the northern half of the City of Los Angeles. These retailers represent approximately 93% of the ammunition transactions recorded during the study period. None of the business premises of the 10 ammunition retailers were located near the high crime South Los Angeles area of the city. Although this area leads the city in total homicide and total gun crime, none of the “local” places to purchase ammunition actually falls within the Los Angeles city limits. According to the LAPD and ATF, the likely ammunition supply for this area consists of the nearly one dozen ammunition dealers near South Los Angeles which are located just outside of the city limits in the surrounding Los Angeles County municipalities, and therefore not required to record ammunition purchases. Thus, our analysis of Los Angeles’ ammunition data represents a snapshot of the ammunition market in the northern half of the city. Though it is only a portion of the city, in 2002 the San Fernando Valley’s 1.4 million residents comprised 37% of the city’s population. By itself it would rank as the seventh largest city in the United States.

## RESULTS

In April and May 2004 there were 2031 unique purchasers who made 2540 transactions that resulted in the sale of 4823 boxes of ammunition that totaled 436 956 rounds.

### Who buys ammunition?

Though most of the ammunition purchasers reside locally, a small number of non-California residents ( $n = 60$ ) also purchased ammunition in the city. It is not clear whether these individuals purchased ammunition while visiting or if these are new local residents who have not yet changed their official place of residence. Among the remaining 97% of purchasers ( $n = 1971$ ), Los Angeles city residents make up 70% of the purchasers and another 19% reside within Los Angeles County. The overwhelming majority of purchasers live within the San Fernando Valley, which is to be expected as ammunition prices are relatively stable across merchants. An informal survey of local ammunition dealers in and around Los Angeles indicated that a 500 round box of lower end .22 ammunition ranged from \$14 to \$16, a difference for which we do not expect consumers to travel great distances given that local gas prices peaked at \$2.36 per gallon during this period.

While 92% of gun purchasers in Los Angeles County are male,<sup>9</sup> a slightly larger percentage (96%) of ammunition purchasers in the city are male. As shown in table 1, bullet purchasers are also more likely to fall into the 21–24 years age category (15%) than gun purchasers (9%).



**Table 1** Age distribution of Los Angeles county handgun purchasers and Los Angeles city ammunition purchasers

Age (years)	Handguns (county)	Ammunition (city)
21–24	9.0%	15.4%
25–34	23.5%	28.6%
35–44	25.3%	24.1%
45–54	24.1%	18.0%
55–64	12.9%	8.7%
65+	5.2%	2.9%

### Should they be buying?

During the study period, 6.5% of ammunition purchasers had a criminal record. A criminal record, however, is not sufficient for prohibiting a purchaser from buying ammunition. Federal law prohibits convicted felons and domestic violence misdemeanants from acquiring ammunition. Additionally, California state law includes provisions that prohibit individuals convicted of violent misdemeanors from purchasing and possessing ammunition. Of the study's ammunition purchasers, 1.5% had prior felony convictions; 13 drug related felonies, eight grand theft or burglary felonies, two cases of felony check fraud, two weapon offenses, and one case each of extortion, stalking, and sex with client (details of two other felony convictions were unknown). An additional 1.1% of the purchasers had other conditions (for example, misdemeanor assault or an active restraining order) that prohibited their purchases. Table 2 summarizes these findings.

These prohibited possessors made 2.8% (71/2540) of all transactions and collectively purchased 2.3% (10 050/436 956) of the rounds sold in the two month study period. They generally purchase the same kinds of ammunition as legal purchasers. For example among prohibited possessors, 40% purchased 9 mm ammunition while 38% of legal purchasers bought 9 mm ammunition. By comparison, the Violence Prevention Research Program<sup>9</sup> reported that 0.8% of attempted gun purchases statewide involved a prohibited possessor in 2000, but the background check and 10 day waiting period interrupted those purchases. While the Los Angeles ammunition ordinance requires ammunition transactions to be recorded, there is no instant check and before 2004 the logs were only referenced when police were following up on specific crimes. As a result prohibited possessors were able to purchase ammunition with little risk of detection.

**Table 2** Criminal background of ammunition purchasers

	n	Percentage during study period (95% CI) <sup>†</sup>
Unique purchasers	2031	
Purchasers with a criminal record*	133	6.5 (5.5 to 7.6)
Purchasers prohibited from purchasing ammunition	52	2.6 (1.9 to 3.2)
Felony conviction	30	1.5 (1.0 to 2.0)
Non-felony offense	22	1.1 (0.6 to 1.5)

\*Having a criminal record does not necessarily prohibit ammunition purchases.

<sup>†</sup>The 95% confidence intervals are computed as if April and May are representative of a stationary process of ammunition purchasing.

### CONCLUSIONS

These data suggest that, despite having to identify themselves through showing a driver's license, leaving a fingerprint, and creating a record of the transaction, prohibited purchasers

still buy ammunition at Los Angeles dealers. Though some ineligible buyers may be deterred by these requirements and make purchases at dealers beyond the city limits, the lack of enforcement of existing laws means that prohibited persons still complete the required elements of the transaction and walk out of the store with ammunition.

In an attempt to stem the flow of ammunition to prohibited purchasers, policy makers might consider extending instant background checks to include ammunition purchases. A criminal background check would be an unnecessary inconvenience in about 97% of ammunition transactions in Los Angeles. However, in just two months, prohibited persons acquired some 10 050 rounds through retail outlets. A background check would eliminate illegal ammunition transactions at retail outlets and denied ammunition purchase rate would probably converge to around 0.8%, the denial rate for firearms. Similar to the illegal market substitution effects associated with the passage of the Brady Law,<sup>10 11</sup> prohibited purchasers seem likely to exploit alternative sources of ammunition such as unregulated private sellers operating in the secondary firearms markets.

An alternative policy to the instant criminal background check would be to use the ammunition transaction records as an intelligence gathering tool for law enforcement. Routine examination of ammunition purchasers could be used to identify prohibited persons who illegally possess ammunition and, most likely, illegally possess firearms as well. The ammunition logs have been used as a basis for developing probable cause in securing search warrants, some of which have resulted in the recovery of illegal firearms [conversation with the supervising attorney of the Gun Violence Section of the Los Angeles City Attorney's office].

At present, the key impediment to the utility of the Los Angeles ammunition log for law enforcement is that it is restricted to dealers located within the city limits. Los Angeles residents can easily cross into other areas of the county and purchase untraceable ammunition. Given the dearth of purchasers residing in South Los Angeles, and that these neighborhoods have severe gun violence problems, it is clear that Los Angeles retailers are not the source of this area's ammunition supply. Illegal street sales, mail order purchases, and retail purchases outside the city limits are all possible ammunition sources, none of which is currently monitored. A first step in turning the ammunition log into a useful intelligence tool for South Los Angeles would be to have neighboring municipalities cooperate in a concerted effort to collect similar data on ammunition transactions. Although our study focused on one part of Los Angeles, our findings have implications for other states and nations that monitor firearm sales but not ammunition purchases; without monitoring or enforcement, prohibited purchasers are not completely deterred from purchasing ammunition.

### Implication for prevention

Relative to firearms and ammunition in legal hands, guns and ammunition in the hands of a prohibited possessor are at high risk of being used in violent crime.<sup>12</sup> Monitoring ammunition transaction can reduce that risk by either following those criminal purchasers back to their firearms or interrupting criminal purchases at the point-of-sale with an instant check. Expanding the monitoring to the county level or the state level may result in FFLs beyond the jurisdiction of the legislation becoming easy sources for illicit ammunition purchases. Due to less stringent gun controls, dealers in Nevada and Arizona are already noteworthy out-of-state sources of crime guns recovered in Los Angeles<sup>13</sup> and seem likely to become illicit sources of ammunition. A statewide program might push the illegal ammunition

**Key points**

- Individuals prohibited from purchasing firearms and ammunition continue to purchase ammunition through licensed dealers because existing laws are rarely enforced.
- In the City of Los Angeles during the study period, prohibited individuals purchased 10 050 rounds of ammunition, 2.8% of all transactions.
- Firearm policy should adopt the public health approach, which recognizes the importance of addressing both the mechanism of delivery (the gun) and the agent of harm (the bullet) in order to be effective in reducing gunshot injuries.

purchases out of the state and, therefore, increase the “effective price” of illegal ammunition sales on the streets of Los Angeles.<sup>14</sup> Increasing the costs associated with the illegal acquisition of ammunition may cause criminals to economize on firearm use and, in turn, reduce gun violence. The potential for substitution to alternative black market sources is a concern for any gun market intervention.<sup>15</sup> Nonetheless, given the heavy burden of gun violence, policymakers need to consider policy interventions that remove easy opportunities for violent gun-using criminals to arm themselves.

**Study limitations**

This study used administrative data from 10 of 13 non-law enforcement ammunition retailers in the City of Los Angeles over a two month period. Therefore, this study’s findings may not be representative of all ammunition transactions in the greater Los Angeles area nor in other cities around the world. Although the Los Angeles city ordinance requires dealers to document all ammunition transactions there may be non-compliance. Compliance could be associated with whether or not the purchaser is eligible to possess ammunition. ATF completed the background checks for all purchasers based on names and state issued IDs from the hand written logs collected from the retailers. Accurate criminal history checks depended on this information being written correctly and clearly on the forms.

**ACKNOWLEDGEMENTS**

This research was funded by a grant from the National Institute of Justice No 2001-IJ-CX-0028. The funder was not involved in the design or conduct of this study.

**Authors’ affiliations**

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Competing interests: none.

**REFERENCES**

- 1 **Hootman JM**, Annett JL, Mercy JA, *et al*. National estimates of non-fatal firearm related injuries other than gunshot wounds. *Inj Prev* 2000;**6**:268–74.
- 2 **Bureau of Justice Statistics**. *Key facts at a glance: Crimes committed with firearms, 1973–2004*. Available at <http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm> (accessed May 2006).
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# EXHIBIT 2



## REPORT TO COUNCIL

### City of Sacramento

915 I Street, Sacramento, CA 95814-2604  
www.CityofSacramento.org

Staff Report  
**August 12, 2008**

**Honorable Mayor and  
Members of the City Council**

**Title: Presentation: Ammunition Sales Records Study**

**Location/Council District:** Citywide

**Recommendation:** Receive a special presentation by the Sacramento Police Department on the outcomes associated with passage of a series of City Ordinances mandating ammunition sales logs.

**Contacts:** James Maccoun, 808-0417 Rick Braziel, 808-0800

**Presenters:** Rick Braziel, Chief of Police ; James Maccoun, Police Captain

**Department:** Police

**Division:** Office of the Chief

**Department ID:** 11001021

#### **Description/Analysis**

**Issue:** This report provides information and the findings by the Sacramento Police Department approximately one year following the enactment of Chapter 5.66 of the City Code concerning firearm ammunition sales logs.

**Policy Considerations:** Chapter 5.64 of the City Code specifies local regulations concerning the sales of ammunition and/or firearms. This Chapter requires a special City license for such activities and mandates that both the proprietor and designated employees complete a background check.

The City Council enacted Chapter 5.66 of the City Code on August 9, 2007 and made its provisions effective on November 7, 2007. Among the key provisions of this Chapter are requirements that the positive identity of purchasers of firearms ammunition be recorded, paper records be retained by licensees for two years, and key information be forwarded to the Police Department electronically within 5 (five) days of the transaction.

Police Department staff created a secure, electronic method to obtain ammunition records from retailers and established a protocol to identify purchasers who are prohibited by section 12316 (b)(1) of the California Penal

## Ammunition Sales Records Study

August 12, 2008

Code from purchasing or possessing ammunition. The electronic reporting system had the added benefit of insuring compliance with the employee background check requirements of Chapter 5.64 of the Sacramento City Code.

Detectives from the Sacramento Police Department have successfully utilized the information obtained to arrest numerous persons for firearms violations and seize dozens of illegally possessed weapons. Agents from the Federal Bureau of Alcohol, Tobacco, and Firearms have provided resources and assistance.

Both the Sacramento County District Attorney's Office and the United States Attorney's Office for the Eastern District of California have provided prosecutorial counsel. Both offices are actively prosecuting offenders identified through this program based on their respective authority.

### **Environmental Considerations:**

**California Environmental Quality Act (CEQA):** This report concerns administrative activities that will not have any significant effect on the environment, and that do not constitute a "project" as defined by the California Environmental Quality Act (CEQA) [CEQA Guidelines Sections 15061(b)(3); 15378(b)(2)].

**Sustainability Considerations:** There is are sustainability considerations associated with this report.

**Commission/Committee Action:** Not Applicable

**Rationale for Recommendation:** Not Applicable

**Financial Considerations:** There are no General Fund impacts or financial considerations associated with this report.

**Emerging Small Business Development (ESBD):** This action is not subject to the California Environmental Quality Act (CEQA) because it does not constitute a "project" as defined in section 15378 of the CEQA Guidelines, and is otherwise exempt pursuant to section 15061(b)(3) (no significant effect on the environment) of the CEQA Guidelines.

Ammunition Sales Records Study

August 12, 2008

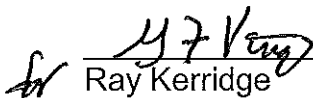
Respectfully Submitted by:

  
James Maccoun, Police Captain

Approved by:

  
Rick Brazier, Chief of Police

Recommendation Approved:

  
Ray Kerridge  
City Manager

Ref: COP XXX

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**Attachments**

1 Background pg. 4

2 PowerPoint Presentation pg. 6

**Attachment 1****Background**

The City's ammunition sales log ordinance does not prevent or delay a sale of ammunition at the point of sale. Instead, it mandates that the firearm dealers record the identity of the purchaser and details of the transaction and then forwards this data to the Sacramento Police Department. This data has allowed the Department to identify and investigate offenders involved in firearm-related crimes.

This ordinance requires that the following key bits of data be recorded on a form approved by the Chief of Police at the time of the ammunition purchase:

- name, address, and date of birth of transferee;
- the date of the sale;
- the transferee's driver's license number, state identification card number, passport number, or other valid government-issued photographic identification;
- the brand, type, and quantity of firearms ammunition transferred;
- the identity of the person transferring the firearms ammunition on behalf of the ammunition vendor;
- the transferee's signature and right thumbprint.

The requirement that the right thumbprint of the transferee be included for the purpose of positive identification of offenders has proven to be essential for the successful prosecution of violators.

This ordinance also requires that vendors transmit to the Police Department electronically all of the identifying information. This requirement has allowed the Police Department to electronically check the legal firearms rights status of transferees. The system for the electronic transfer of purchaser information was operational on January 23, 2008 and has proven to be secure, effective and reliable. The Sacramento Police Department confirms the legal eligibility of all purchasers of firearms ammunition which is reported pursuant to this ordinance.

The cooperation, compliance, and assistance of all gun and ammunition dealers has been very good. Initially it was determined that not all dealers understood or were in complete compliance with the existing requirements for employee work permits. Because the ammunition log reporting system required that transactions be tracked by employee at the point of sale this situation was quickly and voluntarily corrected by those involved. On-site inspections and follow-up investigations have revealed no violations and responsible conduct by all licensees in the City of Sacramento.

The rate of detection of criminal violators has proven to be higher than originally expected. In order to be effective and to rapidly recover illegal weapons additional

## Ammunition Sales Records Study

August 12, 2008

investigative staff had to be assigned to assist in these investigations. The Police Department does not know at this time how long it can sustain such comprehensive follow-up investigation.

The ordinance and the enforcement program which has resulted from it, have proven to be effective tools for locating firearms violators. Staff believes that this is the only program in existence in the nation which electronically records all local purchases of firearms ammunition and checks the legal eligibility of every purchaser to possess firearms and ammunition.

# Ammunition Ordinance

-2250 purchasers-  
January 16<sup>th</sup> 2008 to June 29<sup>th</sup> 2008



Customer Information - City of Sacramento Ammunition Registration Form - Mozilla Firefox

File Edit View History Bookmarks Tools Help

https://207.105.162.5/AmmoRegistration/customer.aspx format Date Report Field

Public Safety IT Sacramento Public Sa... HelpSTAR CivilServiceBoardRule... Parody Motivator Ge... Oracle | PeopleSoft E...

## City of Sacramento Ammunition Registration Form

[Log Out](#)

### Customer Information

\* First Name:

Middle Initial:

\* Last Name:

\* Address 1:

Address 2:

\* City:

\* State:

\* Zip Code:

\* ID Number:

\* ID Type: ☐ State ☐ Military ☐ Passport ☐ Other

\* specify

\* Date of Birth:

\* POS Employee: John Doe

Comments/Notes:

\* = required field

2007, City of Sacramento. If you are having technical issues with the registration form or have a general question, please call (916) 808-0700 Monday through Friday 8 a.m. to 5 p.m.

Done 207.105.162.5



# Prohibited persons

- 74 prohibited people purchased ammunition
  - 61 had felony convictions (84%)
  - 12 had misdemeanor convictions (16%)
  - Only 1 of the prohibited based on DV restraining order
- Prohibited persons are 3.2% of purchasers

# Suspects with felony convictions

- 34% (21) prohibited because of a violent felony conviction
- 49% (30) prohibited because of non-violent felony conviction
- 16 % (10) prohibited because of narcotic sales prior

# Prohibited purchasers

- 5 were gang members
- 16 were on probation (no parolees)
- 3 had warrants (non-traffic)
- 11 were 2<sup>nd</sup> strikers
- 1 was a 3<sup>rd</sup> striker

# Ammunition purchased

- 67% of the ammunition purchased would primarily be used in handguns
- 17% of the ammunition could be used in handguns or rifles
- 10% was rifle ammunition
- 6% was shotgun ammunition

# Status of cases

- 51 people have been arrested
- 6 arrest warrants have been issued
- 15 cases currently under investigation

# Charges filed by DA

- 53 people charged with a felony
- 1 person charged with a misdemeanor
- 1 case rejected by DA

# Federal prosecutions

- 7 suspects have been indicted in federal court

# Resolution of cases

- 11 have received felony convictions
- 8 have received misdemeanor convictions
- No federal cases adjudicated yet



# Searches

- 28 search warrants have been executed
- 17 probation searches have been completed
- Firearms and/or ammunition were located 66% of the time

# Evidence recovered

- 56 firearms seized
- 100 marijuana plants
- 30 doses of Ecstasy
- 1 Stolen laptop taken in residential burglary
- 3 Stolen firearms

## Firearms seized

- 34% (19) were pistols
- 46% (26) were rifles
- 19% (11) were shotguns
- 7 were assault weapons
- 2 were Federal NFA violations
- 3 were stolen

# NFA and AW seizure



Case: 20-55437, 06/12/2020, ID: 11720840, DktEntry: 15-3, Page 240 of 293

# Prohibited AW and receivers



ER 636



# All firearms to be traced



ER 637

# Resources

- 4 SPD Detectives, 1 ATF Agent, and 2 light duty Officers
- Search warrant service often requires assistance from SWAT teams
- These investigations require timely and diligent effort

## Additional findings

- Good cooperation by firearm dealers
- Employee background checks maintained
- Inspections have been made and will continue
- SPD and allied agencies use information in criminal investigations regularly



# EXHIBIT 3



*State of New Jersey*  
*Commission of Investigation*

# **ARMED** **AND DANGEROUS**

«»

**Guns, Gangs and Easy Access  
to Firearms Ammunition  
in New Jersey**

*February 2007*

*State of New Jersey*  
*Commission of Investigation*



**ARMED**  
**AND DANGEROUS**

**Guns, Gangs and Easy Access  
to Firearms Ammunition  
in New Jersey**

SCI  
28 West State St.  
P.O. Box 045  
Trenton, N.J.  
08625-0045

609-292-6767

[www.state.nj.us/sci](http://www.state.nj.us/sci)



## State of New Jersey

### COMMISSION OF INVESTIGATION

28 WEST STATE STREET

PO BOX - 045

TRENTON, NEW JERSEY 08625-0045

TEL (609) 292-6767

FAX (609) 633-7366

**W. Cary Edwards**

*Chair*

**Joseph R. Mariniello, Jr.**

**Kathy Flicker**

**Patrick E. Hobbs**

*Commissioners*

**Alan A. Rockoff**

*Executive Director*

February 2007

Governor Jon S. Corzine  
The President and Members of the Senate  
The Speaker and Members of the General Assembly

The State Commission of Investigation, pursuant to N.J.S.A. 52:9M, herewith  
formally submits the final report of its investigation into the subversion of legal firearms  
ammunition sales in New Jersey.

Respectfully,

W. Cary Edwards  
Chair

Kathy Flicker  
Commissioner

Joseph R. Mariniello, Jr.  
Commissioner

Patrick E. Hobbs  
Commissioner

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## *Executive Summary*

The Commission undertook an investigation into the sale and availability of firearms ammunition as part of an ongoing statutory mission to monitor organized crime and assist law enforcement. Initially focused on certain criminal activities involving street gangs and drug-dealing syndicates, the probe was broadened to encompass a wide range of disturbing issues stemming from the ease of legal access to ammunition, particularly for handguns.

In sum, the findings of this unprecedented statewide investigation shatter conventional wisdom and raise critical questions that bear directly upon government's fundamental duty to safeguard the public. While New Jersey maintains some of the most stringent and restrictive laws in the United States governing the purchase and sale of handguns, the trade in actual bullets – the very projectiles that make firearms lethal – remains a wide-open, unregulated bazaar of misguided commercial activity the practical effect of which includes exacerbated gun violence on the streets of communities across this state.

On any given day, shoppers in New Jersey can enter retail gun outlets, sporting goods stores and other venues and readily purchase firearms ammunition of virtually every caliber in about as much time, and with about as much effort, as it takes to buy a soccer ball or a bag of groceries. The sole prerequisite for an ammo transaction – and this is not even codified in law – is the display of some form of identification, however rudimentary, that purports to establish the buyer's proof-of-age. Proper credentials to own a gun are not required. Even if an individual is expressly prohibited by law from owning a gun, ammunition is another matter entirely. The buyer could be a convicted

felon, a gang member, someone with a history of mental illness or violence – a terrorist even. No matter: As currently structured, the system allows bullets to be sold indiscriminately.

To gain a clear and comprehensive understanding of just how vulnerable this system is to subversion by criminal elements, the Commission tested and examined lawful sales of handgun ammunition at 60 retail establishments licensed by the state to sell firearms.<sup>1</sup> The stores were selected randomly with wide geographic distribution across 19 of New Jersey's 21 counties. In some instances, criminal informants acting at the direction of Commission investigators entered the stores and successfully bought ammunition even in situations where they produced false identification. In others, handwritten sales logs – the only form of record-keeping required of such stores – revealed numerous purchases of handgun ammunition by persons with a veritable laundry list of criminal histories, including assaults on police officers, sex and drug offenses, domestic violence, child abuse and ties to organized crime.

In all, 43 of the 60 retail outlets surveyed by the Commission – nearly three-quarters of the sample – were found to have sold handgun ammunition to individuals with criminal records. Further analysis showed that most of these buyers did not possess proper credentials to own or possess any kind of firearm, either a handgun or a long gun (rifle or shotgun).

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<sup>1</sup> According to the State Police, there are approximately 330 wholesale and retail establishments in New Jersey licensed to sell firearms.

As a consequence of this unbridled traffic in firearms ammunition, the Commission found:

**Ammo Purchases by Gang Members/Associates**

- Individuals known to police as members or associates of criminal street gangs purchase handgun ammunition lawfully in New Jersey. Some of this ammunition has been traced to actual subsequent criminal activity, including homicides and other gang-related gun violence. In one instance, individuals later identified as members of the Bloods, the most notorious of the proliferating gangs in New Jersey, purchased ammunition at retail stores and took target practice at a legitimate indoor firing range.

**Ammo Purchases by Convicted Felons**

- Lawful purchases of ammunition by convicted felons are widespread. At one store alone, more than 15,000 rounds of handgun ammunition were sold to 42 convicted felons over one four-year period. The criminal history of one such individual included convictions for aggravated assault, unlawful possession of a handgun, unlawful use of a body-armor vest, and possession of a weapon for unlawful use.

**Repeat Purchases by Persons with Criminal Records**

- Repeat purchases of ammunition by individuals with criminal records are not uncommon. Indeed, store sales logs revealed repetitive



purchases of significant quantities of handgun ammunition – thousands of rounds at a time – by individuals over a relatively brief period.

#### **Under-Age Purchases**

- Despite the proof-of-age requirement contained in the New Jersey Administrative Code, individuals later determined to be under-age – including juveniles – were found to have successfully purchased handgun ammunition at retail stores.

#### **“Straw” Purchases**

- “Straw” purchases, in which ammunition is bought by a surrogate on behalf of someone seeking to conceal his/her own identity and involvement in the transaction, are carried out with ease in New Jersey.

#### **Unrestricted Sale of Handgun Ammunition via the Internet**

- Handgun ammunition of every size and caliber – including particularly deadly hollow-point, or hollow-nose, bullets – is readily available from Internet Web sites maintained by dealers in New Jersey and elsewhere in the nation. Commission investigators using their real names, a simple credit card and the mailing address of the SCI’s Trenton headquarters as the ordering destination successfully purchased a small arsenal of handgun ammunition, including hollow-points, from internet sites without providing any proof of age or identification.

### **Limited Recourse for Ammunition Dealers**

- Under the current law allowing broad and largely unrestricted access to ammunition, store owners have little recourse but to complete sales transactions even when approached by suspect individuals. In effect, they must choose between risking confrontation with customers they turn away – including threats of possible civil action or worse – or acting as accomplices in the legal conveyance of merchandise possibly destined for the criminal underworld.

### **Obstacles to Law Enforcement**

- State and local police and prosecutors are restricted in their ability under current law to intervene in ammunition sales. They have no authority to bring charges for possession of ammunition and have their hands tied when it comes to referrals from retailers of suspicious customers. Police also have no recourse under the law in circumstances involving the seizure of ammunition during execution of a search warrant stemming from a suspected violent crime.
- Handwritten ammunition sales logs maintained by retailers are often illegible and contain inconsistent data. Moreover, local police and county prosecutors do not have legal access to these logs absent a court order.

While this investigation dealt primarily with the subversion of legal ammunition sales, the Commission during its course also discovered gaps and inconsistencies in the

current system for tracking and controlling possession of firearms. For example, although New Jersey law requires gun owners to relinquish their licensing credentials if they suffer certain disabilities – a permit in the case of a handgun, a firearms identification card in the case of a long gun – this requirement is not routinely or consistently enforced.

Given the combined urgency of these matters, the Commission on December 12, 2006 conducted a public hearing in Trenton to air the preliminary findings of its investigation and to gather additional facts and data through testimony from various expert witnesses. The full transcript of that proceeding is contained on a CD attached to this final summary report. The Commission wishes to express its gratitude to those distinguished members of the law enforcement community who participated in this investigation. Inter-agency cooperation at the federal, state and local levels made possible its successful completion.

But just as this report represents an end, it is also a beginning. Pursuant to its statutory mission to make recommendations for improvements in laws and regulations, the Commission herein outlines a series of practical systemic reforms designed to assist government in general, and law enforcement in particular, to fulfill their overarching responsibility to safeguard public safety and welfare. Under present circumstances, that responsibility is in deep peril. It is patently ridiculous, shocking even, to contemplate a system that requires a background check and an official permit to own a handgun but, unaccountably and astonishingly, mandates nothing of the sort as a condition for purchasing the means to transform that gun into a deadly weapon. It is a system that undermines the authority of our police, makes a mockery of our gun control laws and renders the streets of our towns and cities more dangerous at the very moment we are

struggling to come to grips with a rising tide of gang violence. The factual foundation established by the findings of this investigation provides an ample basis for long-overdue legislative, regulatory and prosecutorial remedies, and the Commission stands ready to assist in that vital effort.

## ***Guns vs. Ammunition: The Law***

### **New Jersey's Mixed Message**

Under state law in New Jersey, it is far easier to buy the lethal ingredients for firearms than to purchase the weapons themselves.<sup>2</sup> Indeed, by way of comparison, the state's current statutory framework provides a more elaborate web of regulation for the ownership and operation of motor vehicles than for access to firearms ammunition.

It is noteworthy that few aspects involving access to ammunition even carry the force of statute. The only regulatory provisions, such as they are, reside instead in the state's Administrative Code at Title 13, Chapter 54. This section of the Code requires purchasers of ammunition to display personal identification but does not specify the type. For sales of handgun ammunition, the Code also requires retail dealers to maintain a written record of all sales transactions showing the name of the ammunition manufacturer; the type, caliber or gauge; the quantity sold and date of sale; and the name, address and date of birth of the purchaser. No such records are required for the sale or disposition of ammunition for rifles or shotguns. However, with respect to both handguns and long guns, dealers are required to confirm the lawful age of the buyer – 21 for handgun ammunition, 18 for rifles and shotguns – but the Code does not specify the method for doing so. Nor does the Code specify or require any means to verify or corroborate the veracity of the identification materials displayed.

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<sup>2</sup> The Appendix to this report contains two exhibits presented during the Commission's public hearing to illustrate weaknesses in current laws and regulations governing sales and possession of ammunition. Exhibit A-101 shows the sharp contrast between statutory prohibitions on the sale of guns versus ammunition, while Exhibit A-101-a is the official application required for the purchase of firearms.

The only statutory restrictions involving access to firearms ammunition in New Jersey are contained in N.J.S.A. 2C:39, which makes it a fourth degree crime to manufacture, transport, sell, ship or possess hollow-nose (also known by the terms “hollow-point” and “dum-dum”) and/or body-armor-piercing handgun ammunition. The apparent force of these prohibitions, however, are weakened by wholesale exemptions, which include not only law enforcement officers, military personnel, collectors and licensed sellers, but also any individual who purchases such ammunition and transports it to, or stores it at, his/her property or residence. Hollow-point bullets, which are designed to maximize physical trauma upon impact, are readily available without restriction via the Internet. During this investigation, Commission investigators purchased hundreds of rounds of such ammunition from dealers who maintain Web-based sales outlets in New Jersey and other states.

• • •

State laws governing the sale and purchase of actual firearms, meanwhile, are far more detailed and restrictive. The critical elements are as follows:

Retail dealers of firearms must be licensed by the state and adhere to a wide range of standards and qualifications designed to safeguard the public safety, health and welfare. Indeed, the statutory strictures related to firearms sales are so exacting under N.J.S.A. 2C:58-2 that dealers are not even allowed to place any “firearm or imitation thereof . . . in any window or in any other part of the premises where it can be readily seen from the outside.”

As to buyers, anyone purchasing or otherwise acquiring a handgun in New Jersey must be at least 21 old and possess a permit signed by the chief of police of the

municipality in which the applicant resides, or by the Superintendent of the State Police if the applicant's locale maintains no full-time police department. In the case of a long gun (rifle or shotgun), the minimum age for ownership is 18 and, upon approval of the local police chief or State Police Superintendent, the applicant is issued a Firearms Purchaser Identification Card.

With regard to both handguns and long guns, the application form is quite detailed as to the type and nature of information required. In addition to filling it out, applicants must submit two sets of fingerprints and sign a form consenting to a search of mental health records. Applicants are also required to undergo a criminal background check.

State law prohibits the sale or transfer of a handgun or long gun to any person who:

- Has been convicted of a felony.
- Is drug dependent.
- Has been or is confined to an institution for treatment of a mental disorder.
- Suffers from a physical disease or defect which would make it unsafe for him/her to handle firearms.
- Knowingly falsifies any information on the application form.
- Refuses to waive statutory or other rights of confidentiality relating to institutional confinement.
- Is subject to a domestic violence court order.
- Has been convicted in any court of a misdemeanor crime of domestic violence.
- If in possession of a firearm, would otherwise be determined to be a threat to the public health, safety and welfare.

## **Other Jurisdictions: Tough Ammo Controls**

While New Jersey leads the nation in some respects in its statutory framework for regulating ownership of guns, it lags behind the federal government and a number of states and cities in controlling access to ammunition. The following summary of legal

controls over the sale and possession of ammunition in other jurisdictions bears upon the fundamental issues raised in the Commission's investigation:

*Federal Law*

Title 18 of the United States Code makes it unlawful for any person to purchase a firearm and/or ammunition who:

- Has been convicted in any court of a crime punishable by a prison term exceeding one year.
- Is a fugitive from justice.
- Is an unlawful user of or addicted to any controlled substance.
- Has been adjudicated as a mental defective or who has been committed to an institution for treatment of a mental disorder.
- Is an undocumented alien.
- Has been dishonorably discharged from the U.S. Armed Forces.
- Has renounced his/her U.S. citizenship.
- Has been convicted in any court of a misdemeanor crime of domestic violence.

## Other Jurisdictions

## Delaware

Like the federal government, Delaware prohibits convicted felons from purchasing and possessing ammunition but extends the prohibition to a far more extensive array of suspect individuals, including those

- Convicted of a crime of violence involving physical injury.
- Committed for treatment of a mental disorder.
- Convicted for unlawful use, possession or sale of illegal drugs.
- Adjudicated delinquent as juveniles.
- Subject to family court protection-from-abuse orders.
- Convicted of domestic violence.
- Found to be fugitives from justice.

Violation of these prohibitions is considered a felony under Delaware state law.



### **Illinois**

Persons seeking to purchase handgun ammunition must possess a valid firearm owner's identification card issued by the State Police. Applicants for such cards must be at least 21 years old or, if under-age, obtain written permission from a parent or legal guardian. Disqualifying factors include any felony conviction under the law of Illinois or any other state, addiction to narcotics, mental retardation, status as an undocumented alien and/or confinement to a psychiatric treatment institution within five years preceding the filing of an application.

Illinois also regulates the purchase of ammunition from out-of-state dealers. Any resident who does so must, prior to shipment, provide the seller with a copy of his/her valid firearm owner's identification card and either a valid Illinois driver's license or Illinois State Identification Card. The ammunition may only be shipped to an address on either of those two documents.

### **Massachusetts**

Purchasers of ammunition must obtain a state firearms identification card, valid for no more than six years, and be at least 18 years of age. Those between 15 and 18 must have written permission from a parent or legal guardian. Applicants must be fingerprinted to the State Police. Disqualifying factors include:

- Felony convictions punishable by imprisonment for more than two years.

- Violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental receipt or transportation of ammunition for which a term of imprisonment may be imposed.
- Conviction for possession or sale of illegal drugs.
- Current or past confinement to a psychiatric hospital or institution.
- Being under treatment or confinement for drug addiction or habitual drunkenness.
- Status as an alien.
- Being subject to an order for a permanent or temporary protection due to domestic violence.
- Being subject to an outstanding arrest warrant in any state or federal jurisdiction.

Massachusetts also requires ammunition dealers to be licensed and to report all ammunition sales within seven days to the state's Criminal History Systems Board. Failure to report such transactions can result in suspension or permanent revocation of an individual's firearms identification card or license to carry a firearm, or both, and is punishable by a fine of between \$200 and \$1,000 for the first offense and, for a second offense, a fine of between \$1,000 and \$5,000.

Massachusetts has also made it a crime to own, possess or transfer ammunition to any individual not holding a valid firearms identification card. Violation for this provision is punishable by up to two years in prison and/or a fine of up to \$500. Second or subsequent violations are punishable by imprisonment of up to two years and/or a fine of up to \$1,000.

### **California**

State law prohibits the sale of handgun ammunition to anyone under the age of 21 and makes it a crime to possess or own ammunition by individuals

convicted of felony offenses, violent crimes and sex offenses or by individuals with mental-health disorders or those with drug addictions.

### **Florida**

Besides making it a crime for convicted felons to buy or possess firearms ammunition, Florida has adopted expansive legislation that extends that prohibition to a wide category of persons whose actions have placed them into a statutory category called “violent felony offenders.” These are individuals previously convicted of a felony or a conspiracy to commit one or more of the following crimes: murder, manslaughter, aggravated manslaughter of a child, aggravated manslaughter of an elderly person or disabled adult, arson, sexual battery, robbery, kidnapping, aggravated child abuse, aggravated abuse of an elderly person or disabled adult, aggravated assault with a deadly weapon, armed burglary, aggravated battery, aggravated stalking and the unlawful throwing, placing or discharging of a destructive device or bomb. Individuals convicted of violating this section of the law as it pertains to the prohibition on ammunition possession face a mandatory prison sentence of 15 years without parole.

### **New York State**

State law makes it a misdemeanor for a dealer to sell handgun ammunition to any person not authorized to possess such a firearm.

### **New York City**

Through its administrative code, the city prohibits the sale of ammunition in its jurisdiction to anyone who does not possess a proper license to own a

handgun or rifle. Ownership credentials must also match the caliber of the ammunition purchased.

In addition, sellers of ammunition within the city are required to maintain sales records showing the caliber, quantity and type of ammunition sold; the name and address of the buyer; the date and time of each transaction; the number of the firearm license or permit or a description of the proof of status of an individual claiming to be exempt from licensure. Information contained in these records must be made available to all law enforcement agencies.

New York City also requires permits for any ammunition dealer who intends to store, sell or offer for sale more than 200 rounds of ammunition.

## District of Columbia

Under the city's municipal code, individuals must hold a valid city-issued registration certificate for a firearm in order to lawfully possess ammunition for a handgun or rifle. Further, the ammunition must be of the same caliber and gauge as the registered firearm.

Washington also has imposed some significant requirements on licensed retail dealers. The code prohibits the sale or transfer of ammunition unless

- The transaction is made in person;
- The buyer displays a valid firearms registration certificate or, in the case of a non-resident, provides proof that the weapon is lawfully owned in the jurisdiction where that person resides;
- The dealer checks to ensure that the ammunition requested matches the gauge and caliber of the registered firearm; and
- The buyer signs a receipt, which along with the gun registration identifiers, must be maintained by the dealer for a period of one year from the date of sale.

## *The View from Law Enforcement*

During its December 2006 public hearing on these matters, the Commission received extensive testimony from prominent federal, state and local law enforcement officials who characterized free-wheeling access to ammunition as a dangerous and unnecessarily prevalent component of rising gun violence. Gregory Paw, Director of the State Division of Criminal Justice, starkly summarized the situation as follows:

“We have the toughest laws on sale, ownership, possession and transportation of firearms, but no statute regulating sale of ammunition. . . We need these regulations so that gangsters and thugs have to worry about where they’re going to get their next round. . . . This is what is fueling these violent street gangs . . . [and] there’s no question day-to-day in our cities that this is the number one issue facing law enforcement in New Jersey. It’s a long-term issue. It affects the safety and quality of life for citizens across the state, and it’s turned parts of our urban landscape into very tragically a killing field, and it’s because of these bullets and the guns that these killing fields exist.”

Paw called, at a minimum, for legislation to ban the sale of ammunition without proof that a buyer possesses proper ownership credentials for a gun of the same caliber as the bullets sought. He said such a measure would constitute “one important weapon . . . in our fight against illegal guns and our fight against gangs in New Jersey.”

Similarly, Christopher J. Christie, the United States Attorney for New Jersey, described guns and ammunition as “the stock and trade of the street gangs in New Jersey” and testified that “there is not a county in this state that is immune from gang violence.”

Christie told the Commission he is particularly concerned about the ease with which ammunition can be obtained by seemingly legitimate individuals acting secretly as surrogates for gang members and others linked to the criminal underworld.

“ . . . [T]he straw purchaser aspect of the ammunition problem is enormous,” he testified. “Not only with [individuals] using fake ID, but people who are just going in at the direction of members of gangs and buying just incredible amounts of ammunition . . . tens of thousands of rounds of ammunition that they will use and they will store in safehouses throughout the city, separate from where they keep the firearms, and then they have people who . . . will collect the ammunition from the safehouses for use.

“I think that a great service [the Commission] will be doing is to look at those laws that cover the sale of ammunition, and I think the federal government has to look at that as well because you’re only dealing with half the problem when you’re dealing with the gun issue.”

Three investigators for the Monmouth County Prosecutor’s Office – Captain Brian Rubino, Lieutenant James Scully and Detective Rosendo Perez – described the purchase of handgun ammunition from a suburban sporting goods store by under-age members of the Bloods street gang and called for more stringent controls and identification requirements. At a minimum, they said, the system for providing official credentials for the purchase of firearms should be strengthened and extended to ammunition and include photographic I.D. cards with fixed expiration dates.

“ . . . [I]f you talk to the average law-abiding citizen, they would be amazed to hear how easy it is to buy ammunition in the State of New Jersey,” Rubino stated. “Not many law enforcement officers understand how easy it is to purchase ammunition.”

Indeed, Rubino said it has been his experience that criminals, gang members and others have easily adapted to the paradoxical statutory structure governing access to guns and ammunition. “There is what is called a sharing of firearms,” he stated. “There might be one firearm with six individuals that have access to it. It’s not unusual over the last number of years to find ammunition on individuals on the street or in their houses. Most of them that we come across . . . are convicted felons, but they have access to ammunition. When they need their gun, they make a phone call and it’s delivered to them or they go to a location and pick it up.

“ . . . [I]f they didn’t have access to buy [ammunition], being required to have a firearms ID card, they wouldn’t get to the first step to get it in their hands.”

Trenton Police Detective Frank Clayton and Frank Guido, an investigator for the Mercer County Prosecutor’s office, testified that it is not unusual to find caches of commercially-purchased ammunition during searches of property linked to criminal suspects. In one such instance, they recounted the discovery of assorted boxes of handgun ammunition inside the car of an individual stopped by Trenton police and found to be the subject of outstanding arrest warrants. The bullets, including 50 rounds each of .380 cal., .25 cal. and 9 mm ammunition, were found in a bag bearing the name of a prominent sporting goods store along with what appeared to be a handwritten ammunition shopping list. Subsequent investigation determined that the ammunition was purchased at the behest of a high-ranking member of the Bloods.

“There are a lot of things that can be done,” Guido stated. “This gets tossed around among law enforcement officers all the time. . . .One of the things that really doesn’t make sense to us is that a person who does not have the ability or the legality to

purchase a handgun or permit to purchase a handgun [is now] allowed to purchase handgun ammunition just because they're [a certain age] and have identification."

Guido and Clayton also expressed serious concern over the absence in the current system of any mechanism to alert retailers, prior to completion of a transaction, that they might be selling ammunition to an individual with a criminal record. Likewise, they noted that law enforcement agencies across New Jersey presently lack the ability to "red flag" excessive ammunition purchases or purchases by persons linked to gangs or other criminal organizations and threat groups.

State Police Lt. Col. Frank Rodgers, meanwhile, pointed to recent record levels of gun-related homicides in New Jersey's major cities and stated bluntly, "The citizens of those communities are absolutely terrorized." By maintaining a system that allows virtually unrestricted firearms ammunition sales, he said, "we're making it easy for them to shoot at us. It's that simple."

Rodgers, who appeared with Detective Sgt. First Class John Cunha of the State Police Firearms Investigation Unit, told the Commission that, at a minimum, restrictions mirroring federal law should be imposed at the state level to prohibit access to ammunition by felons. "I feel strongly that a convicted offender should not be allowed to purchase or be in the possession of ammunition for the same reason that they shouldn't be allowed to own a gun," he stated. As to the issue of how to control "straw purchases", Rodgers said criminal sanctions should be part of the strategy. "Those penalties have to be substantially enhanced to bring to bear some level of deterrence," he testified. "Very specific facts that I'm familiar with in ongoing investigations demonstrate to me that there [is] no deterrence whatsoever [in] the statutes that exist today."



Rodgers devoted substantial testimony to an evaluation of the need to bring computer databases, digital identification systems and other forms of high-technology – as well as adequate resources – to bear on the challenge of tracking and controlling access to both ammunition and firearms. Echoing concerns expressed by others about gaps like the lack of photographic identification requirements for firearms ownership credentials, he stated that more than five years after the September 11, 2001 terrorist attacks “it’s almost unbelievable that we have taken all of the steps that we have to protect ourselves, and [we have] digital driver’s licenses and everything else, yet we let someone walk into a business to purchase a firearm and we don’t exercise that same level of precaution. . . . At minimum, . . . [the state should] adopt the same standards that we use to protect us when we give a 17-year-old the control of a car. If we’re going to give an 18-year-old control of a gun, it seems logical that we at least do the same thing.” In this context, Rodgers said it is vital for the public to understand how “sophisticated” violent criminal elements in New Jersey have become in recent years in their use of high-technology to communicate with each other and camouflage their activities. “They’ve entirely embraced the Internet,” he said. They’ve optimized it, no bones about it.”

From the law enforcement perspective, the sales logs required of ammunition retailers are emblematic of the type of materials ripe for upgrading through computer technology, Rodgers observed. Currently handwritten in bound volumes, these documents often are difficult to read and contain inconsistent and/or incomplete information. “It seems to me that assuming that we never went beyond the paper system,” he stated, “[it] need[s] to be standardized, and [it] would be incumbent upon us a division to issue something that requires the standard reporting of certain identifiers, master index

type of data. Taking it beyond that, I think the logical step is moving to some sort of electronic medium.” He warned, however, that such an initiative would itself present a challenge because it would require the establishment of an effective high-tech “infrastructure” upon which it could be built.

Rodgers also testified that it is vital for law enforcement agencies in New Jersey to enhance and coordinate the processing and sharing of criminal intelligence information via a comprehensive central repository of data relevant to firearms-related investigations and other activities. New Jersey’s existing State Intelligence Management System (SIMS) provides an effective foundation for such an initiative, he stated, but it also requires “a robust analytical network” to function at full potential. “We can have all the information in the world,” he said, “but if we don’t have somebody that is putting together the types of products, assessments, that will influence law enforcement, decision-makers, legislator[s] and others, we will continue to expend resources in areas where we don’t receive the return on investment that the public demands.”

Finally, Rodgers and Sgt. Cunha addressed the challenge faced by the State Police Firearms Investigation Unit in keeping pace with an ever-increasing workload. The unit is charged with a range of diverse responsibilities, including conducting criminal background checks on applicants for gun permits, auditing weapons-storage practices by retailers and reviewing sales logs. The sheer volume of such activity, combined with limited staff and resources, leaves the Unit little time to track phenomena such as whether, and to what extent, gun owners who suffer disabilities relinquish permits or firearms identification cards, as required by state law. “It’s an antiquated system,” Rodgers testified, “one that didn’t anticipate our reality today, didn’t take account [of] the

resources that we could bring to tighten this up. It certainly was the intention of the legislature back then to put some provisions into place that would . . . keep this in check, and it's a whole different world today.”

## ***Referrals and Recommendations***

The Commission refers the finding of this investigation to the following governmental agencies for any action they deem appropriate:

- The New Jersey Department of Law and Public Safety, including the Office of the Attorney General, the Division of Criminal Justice and the State Police.
- The Office of the United States Attorney for the District of New Jersey.

• • •

### **1. Strengthen Requirements for Purchasing Firearms Ammunition in New Jersey**

Legislation should be enacted to mandate the following requirements for the lawful purchase of firearms ammunition in New Jersey:

- For a handgun, any individual seeking to buy ammunition must, at the time of sale, present proof that he/she is at least 21 years of age and possesses a valid New Jersey permit or license to own such a weapon. In the case of a non-resident of New Jersey, proof must be presented that the weapon is lawfully possessed in the jurisdiction where the buyer resides.
- For a long gun (rifle or shotgun), any individual seeking to buy ammunition must, at the time of sale, present proof that he/she is at least 18 years of age and possesses a valid permit or license to own such a weapon. In the case of a nonresident of New Jersey, proof must be

presented that the weapon is lawfully possessed in the jurisdiction where the buyer resides.

- Firearms ownership credentials should be subject to renewal every three years.
- Ammunition to be purchased must be of the same gauge and caliber as the firearm(s) reflected on the official permit or licensure documents.

## **2. Upgrade and Modernize Firearms/Ammunition Ownership Credentials**

- Any person who obtains a permit or license to purchase and possess a firearm, whether a handgun or long gun, should, as a condition of ownership, be issued an official identification card bearing his/her name, address, physical description, photograph, firearm serial number and license expiration date.
- Any person seeking to purchase ammunition should be required to display this digital photographic identification card as a condition of purchase.

## **3. Tighten Ammunition Sales Practices**

- Any sale or transfer of firearms ammunition physically conducted in New Jersey should be made in person between the seller and the person for whom the ammunition is intended.
- Sellers should be required to examine the firearm permit or licensure documents presented by purchasers to ensure that the ammunition sought

is of the gauge and caliber of the weapon for which such documents were issued.

- Prior to completion of any ammunition sale, the purchaser should be required to sign a receipt, a copy of which must be retained by the seller.
- Boxes and other containers of ammunition to be sold in New Jersey should be stamped with bar-codes containing information about the contents, and sellers should be equipped with appropriate bar-code scanning technology so that an electronic record of sales transactions can be maintained.
- Vendors should be required to report all ammunition sales within seven days of each transaction to the state, and a determination should be made as to which entity, whether the State Police Firearms Investigation Unit or some other unit of government, would be the most appropriate repository for such information.
- Sellers should be provided with a mechanism to track large-volume and/or unusually frequent purchases of ammunition by buyers.

#### **4. Regulate Out-of-State Ammunition Purchases by New Jersey Residents**

- Any New Jersey resident who seeks to purchase ammunition from out-of-state vendors, either directly or through mail-order catalogs or the internet, should be required to provide such vendors with a copy of his/her firearms permit or licensure documents and a copy of his/her New Jersey photo driver's license or other form of currently valid government-issued photo identification, such as a passport.

- All ammunition purchased in this manner should only be shipped to an address listed on the presented personal identification documents.

## **5. Enact Prohibitions on the Sale, Transfer and/or Ownership of Ammunition**

Legislation should be enacted to prohibit the sale or transfer of firearms ammunition to, and the possession of such ammunition by, any individual who:

- Has been convicted of, or pled guilty to, any crime listed in Title 2C of the New Jersey Criminal Code or any comparable crime in any other state or federal jurisdiction.
- Has been adjudicated a youthful offender or juvenile delinquent in New Jersey or other jurisdiction.
- Has been confined within the past five years to a hospital or institution for the treatment of mental illness.
- Is residing in the U.S. illegally.
- Is currently subject to a restraining order or other order of protection.
- Is currently subject to an outstanding arrest warrant in any state or federal jurisdiction.
- Has been convicted of, or pled guilty to, any violation of law regulating the use, possession, sale, ownership, transfer, purchase, lease, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed.
- Has been convicted of, or pled guilty to, any violation of law regulating the use, possession or sale of controlled dangerous substances or other illegal drugs.

Appropriate criminal penalties should be imposed against anyone convicted of violating such prohibitions. Further, it should be considered a violation of the terms of probation or parole for any offender in any of the above categories to be found in possession of a firearm or ammunition.

## **6. Strengthen Criminal Penalties**

Appropriate criminal penalties, including fines and terms of incarceration, should be enacted for:

- The ownership, possession or transfer of ammunition by anyone not possessing a valid permit or license for a firearm.
- Individuals who leave firearms ammunition unattended in the presence of children or for purposes of illegally transferring it to a person or persons not possessing valid firearms ownership credentials.
- Anyone who possesses ammunition of a caliber, gauge or type but who does not also possess a valid license or permit to own or possess a firearm with which the ammunition may be used.

## **7. Strengthen the N.J. State Police Firearms Investigation Unit**

Licensure fees for the sale and purchase of firearms in New Jersey should be increased to realistically reflect the cost of maintaining effective oversight of such activity, and the proceeds of such fees should be dedicated to the operation of the Division of State Police Firearms Investigation Unit.

## **8. Enhance and Modernize Receipt and Maintenance of Information by Ammunition Sellers**

Under current law, licensed ammunition vendors in New Jersey are required to collect only rudimentary information from buyers – name, address, date of transaction and the amount, type, and caliber of ammunition sold. This information is then entered, by hand, into sales log books subject to periodic inspection by agents of the U.S. Bureau



of Alcohol, Tobacco and Firearms. As the Commission's investigation has shown, however, this limited record-keeping provides law enforcement with a thoroughly inadequate system of oversight over the commerce in guns and bullets.

Legislation, therefore, should be enacted to require that buyers relinquish additional significant information, including the serial numbers of the firearms for which ammunition is being purchased and identifying data from gun ownership permits or licensure documents.

Efforts should also be made to equip vendors with state-of-the-art computer technology that would enable them to forego handwritten logs and enter all information obtained from buyers into a central database accessible to law enforcement.

#### **9. Require Ready Access by Law Enforcement Agencies to Ammunition Sales Information**

Legislation should be enacted to ensure that all information logged by vendors pertaining to the sale of firearms ammunition be made available at any time to all local, state and county law enforcement authorities. In the event a licensed vendor ceases business operations, such records should immediately be surrendered to the local chief of police, county prosecutor or Division of State Police.

## **APPENDIX**

# SALES PROHIBITIONS


## *Guns vs. Ammunition*

### Guns

### Ammunition


#### ➤ Under Age

- Criminal Record
- Public Health, Safety and Welfare
- Medical, Mental or Alcoholic Background
- Narcotics/Dangerous Drug Offense
- Falsification of Application
- Domestic Violence
- Other



**Case: 20-55437, 06/12/2020, ID: 11720840, STATE OF NEW JERSEY, Page 71 of 84**

*This form is prescribed by the Superintendent for use by applicants for Firearms I.D. Cards and Handgun Purchase Permits. Any alteration to this form is expressly forbidden.*



☐ Application for Firearms Purchaser Identification Card  
☐ Application to Purchase a Handgun Amount of permits being applied for: \_\_\_\_\_

All persons wishing to obtain a Firearms Purchaser Identification Card or Permit to Purchase a Handgun are required to complete this application form.  
**Submit in duplicate. (If internet form, make and sign two originals)**

Municipality Code # \_\_\_\_\_

(1) Last Name ( If female, include maiden) First		Middle	(2) Resident Address (Number - Street - City - State - Zip)				
(3) Date of Birth Month / Day / Year	(4) Age (Place of Birth - City - State or Country)		(5) U.S. Citizen <input type="checkbox"/> Yes <input type="checkbox"/> No	(6) Social Security Number - -			
(7) Sex	Height	Weight	Eyes	Race	Hair	Complexion	(8) Distinguishing Physical Characteristics
(9) Name of Employer				(10) Employer's Address (Number - Street - City - State - Zip)			
(11) Occupation				(12) Home Telephone ( ) -		(13) Business Telephone ( ) -	
(14) Driver's License Number & State				(15) If you possess a N.J. Firearms Purchaser ID Card, list the number			

(16) Have you ever been adjudged a juvenile delinquent?	<input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, List Date(s)	Place(s)	Offense(s)	
(17) Have you ever been convicted of a disorderly persons offense, that has not been expunged or sealed?	<input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, List Date(s)	Place(s)	Offense(s)	
(18) Have you ever been convicted of a criminal offense that has not been expunged or sealed?	<input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, List Date(s)	Place(s)	Offense(s)	
(19) Have you ever had a firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun refused or revoked?	<input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, By Whom?	When?	Where	Why?
(20) Have you ever had an Employee of Firearms Dealer License refused or revoked?	<input type="checkbox"/> Yes <input type="checkbox"/> No	If Yes, By Whom?	When?	Where	Why?
(21) Are you an Alcoholic?	<input type="checkbox"/> Yes <input type="checkbox"/> No	(22) Have you ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis? If Yes, give the name and location of the institution or hospital and the date(s) of such confinement or commitment.			<input type="checkbox"/> Yes <input type="checkbox"/> No
(23) Are you dependent upon the use of any narcotic or other controlled dangerous substance?	<input type="checkbox"/> Yes <input type="checkbox"/> No				
(24) Are you now being treated for a drug abuse problem?	<input type="checkbox"/> Yes <input type="checkbox"/> No				
(25) Have you ever been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an in-patient or outpatient basis for any mental or psychiatric conditions? If Yes, give the name & location of the doctor, psychiatrist, hospital or institution and the date(s) of such occurrence.	<input type="checkbox"/> Yes <input type="checkbox"/> No				
(26) Do you suffer from a physical defect or sickness?	<input type="checkbox"/> Yes <input type="checkbox"/> No				
(27) If answer to question 26 is yes, does this make it unsafe for you to handle firearms? If not, explain.	<input type="checkbox"/> Yes <input type="checkbox"/> No	(28) Are you subject to any court order issued pursuant to Domestic Violence? If yes, explain.			<input type="checkbox"/> Yes <input type="checkbox"/> No
(29) Have you ever been convicted of any domestic violence in any jurisdiction which involved the elements of (1) striking, kicking, shoving, or (2) purposely or attempting to or knowingly or recklessly causing bodily injury, or (3) negligently causing bodily injury to another with a weapon? If Yes, explain.					<input type="checkbox"/> Yes <input type="checkbox"/> No
(30) Are you presently, or have you ever been a member of any organization which advocates or approves the commission of acts of violence, either to overthrow the government of the United States or of this State, or to deny others of their rights under the Constitution of either the United States or the State of New Jersey? If yes, list name and address of organization(s) here:					<input type="checkbox"/> Yes <input type="checkbox"/> No
(31) Names & Addresses of two reputable persons who are presently acquainted with the applicant, other than relatives:					
Name		Address		Telephone Number	
A. _____					
B. _____					

**APPLICANT: DO NOT WRITE BELOW THIS SPACE**

A non-refundable fee of \$5.00 for a Firearms Purchaser Identification Card or \$2.00 for each Permit to Purchase a Handgun, payable to either the Superintendent of State Police or the Chief of Police in the municipality in which you reside, must accompany this application.

**APPROVED**

☐

**DISAPPROVED**

☐

**GRANTED ON APPEAL**

☐

**IDENTIFICATION CARD/PERMIT NUMBER(S)**

Reason for Disapproval

☐ A. CRIMINAL RECORD

☐ B. PUBLIC HEALTH SAFETY AND WELFARE

☐ C. MEDICAL, MENTAL OR ALCOHOLIC BACKGROUND

☐ D. NARCOTICS/ DANGEROUS DRUG OFFENSE

☐ E. FALSIFICATION OF APPLICATION

☐ F. DOMESTIC VIOLENCE

☐ G. OTHER (SPECIFY) \_\_\_\_\_

I hereby certify that the answers given on this application are complete, true and correct in every particular. I realize that if any of the foregoing answers made by me are false, I am subject to punishment.

(27) \_\_\_\_\_  
Signature of Applicant Date of Application  
(The disclosure of my social security number is voluntary. Without this number, the processing of my application may be delayed. This number is considered confidential.)

Falsification of this form is a crime of the third degree.

**APPLICANT: DO NOT WRITE BELOW THIS SPACE**

This \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_

**Exhibit A - 101a**

STS-33 (Rev 11/03)

ER-675

Department of Police

# EXHIBIT 4

### **IMPORTANT NOTICE**

#### **CALIFORNIA DEPARTMENT OF JUSTICE UPDATE REGARDING THE USE OF “FEDERAL LIMITS APPLY” DRIVER LICENSES AND IDENTIFICATION CARDS TO PURCHASE FIREARMS**

California law requires a prospective firearms purchaser to present “clear evidence of [the purchaser’s] identity and age.” (Pen. Code, §§ 26815, subd. (c), 27540, subd. (c).)

Any **valid** California driver license or identification card may be used as “clear evidence of the person’s identity and age” (Pen. Code, § 16400), including REAL ID and “FEDERAL LIMITS APPLY” versions (samples below). Please note, however, that:

- A person whose presence in the United States is not authorized under federal law is prohibited from receiving or possessing a firearm or ammunition (18 U.S.C. § 922 (d)(5)(A), (g)(5)(A));
- It is *unclear* whether a person with a “FEDERAL LIMITS APPLY” driver license or identification card is eligible to purchase a firearm under federal law, because that person was not necessarily required to submit satisfactory proof of lawful presence in the United States; and
- Recently enacted state legislation (Cal. Stats. 2018, ch. 885, S.B. 244) prohibits certain “FEDERAL LIMITS APPLY” driver licenses and identification cards—those issued to persons who were not required to submit satisfactory proof of lawful presence in the United States—from being used as evidence of an individual’s citizenship or immigration status for any purpose. These driver licenses and identification cards are physically indistinguishable from other “FEDERAL LIMITS APPLY” driver licenses and identification cards issued to individuals who have provided satisfactory proof of lawful presence in the United States.

The California Department of Justice suggests that if a prospective purchaser presents a “FEDERAL LIMITS APPLY” driver license or identification card, a firearms dealer may wish to consider asking for documentation of lawful presence in the United States, such as a:

- Valid, unexpired U.S. passport or passport card
- Certified copy of U.S. birth certificate
- U.S. Certificate or Consular Report of Birth Abroad of a U.S. Citizen
- Valid, unexpired foreign passport with valid U.S. immigrant visa and approved Record of Arrival/Departure (I-94) form
- Certified copy of birth certificate from a U.S. Territory
- Certificate of Naturalization or U.S. Citizenship
- Valid, unexpired Permanent Resident Card

See the next page for examples of California “REAL ID” and “Federal Limits Apply” Driver Licenses.





Should you have any questions please contact the Bureau of Firearms, Customer Support Center at (855) 365-3767 or via e-mail at [bofdes@doj.ca.gov](mailto:bofdes@doj.ca.gov).

# EXHIBIT 5





California Department of Justice  
Attorney General Xavier Becerra

## **Consumer Alert Regarding the Use of “Federal Limits Apply” Driver Licenses and Identification Cards to Purchase Firearms**

If you have a “FEDERAL LIMITS APPLY” driver license or identification card and wish to use it as identification to purchase a firearm, the dealer might require you to present proof that you are lawfully present in the United States. This is because federal law prohibits anyone who is not lawfully present in the United States from receiving or possessing a firearm or ammunition.

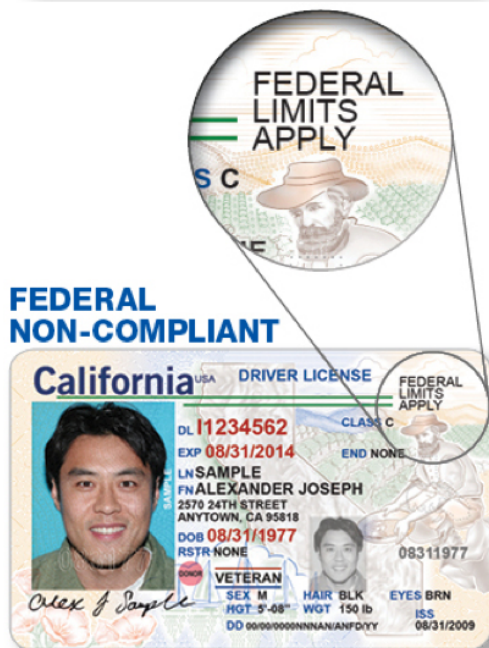
The Department of Motor Vehicles (DMV) currently issues two types of California driver licenses and identification cards: “REAL ID” and “FEDERAL LIMITS APPLY” (samples below). An applicant for a “FEDERAL LIMITS APPLY” driver license or identification card is not necessarily required to provide proof to DMV of lawful presence in the country.

Recently enacted state legislation (Cal. Stats. 2018, ch. 885, S.B. 244) prohibits certain “FEDERAL LIMITS APPLY” driver licenses and identification cards—those issued to persons who were not required to submit satisfactory proof of lawful presence in the United States—from being used as evidence of an individual’s citizenship or immigration status for any purpose. These driver licenses and identification cards are physically indistinguishable from other “FEDERAL LIMITS APPLY” driver licenses and identification cards issued to individuals who have provided satisfactory proof of lawful presence in the United States.

The California Department of Justice has advised firearms dealers that they may wish to consider requiring proof of lawful presence from all purchasers who present a “FEDERAL LIMITS APPLY” driver license or identification card. If you plan to purchase a firearm using a “FEDERAL LIMITS APPLY” driver license or identification card, the dealer might also require you to present one of the following documents:

- Valid, unexpired U.S. passport or passport card
- Certified copy of U.S. birth certificate
- U.S. Certificate or Consular Report of Birth Abroad of a U.S. Citizen
- Valid, unexpired foreign passport with valid U.S. immigrant visa and approved Record of Arrival/Departure (I-94) form
- Certified copy of birth certificate from a U.S. Territory
- Certificate of Naturalization or U.S. Citizenship
- Valid, unexpired Permanent Resident Card

To avoid surprises, you should check with the firearms dealer you plan to visit to verify the dealer's identification requirements. Alternatively, you can obtain a REAL ID driver license or identification card, which would provide sufficient proof of lawful presence in the United States. Please note that beginning October 1, 2020, the federal government will require your driver license or identification card to be a REAL ID if you wish to use it as identification to board a domestic flight or enter military bases and most federal facilities. Information about REAL ID licenses and identification cards can be obtained from the DMV at [www.dmv.ca.gov](http://www.dmv.ca.gov).



*This alert is for informational purposes only and should not be construed as legal advice or as policy of the State of California. If you want advice on a particular case, you should consult an attorney or other expert.*

# EXHIBIT 6



**XAVIER BECERRA**

*Attorney General*

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# California Department of Justice Issues Consumer Alert on the Use of "Federal Limits Apply" Driver Licenses and IDs to Purchase Firearms

Press Release / California Department of Justice Issues Consumer Alert on th...

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1

Tuesday, November 20, 2018

Contact: (916) 210-6000, [agpressooffice@doj.ca.gov](mailto:agpressooffice@doj.ca.gov)

**SACRAMENTO** – Today, the California Department of Justice issued a consumer alert to Californians and a notice to firearms dealers regarding identification requirements for the purchase of firearms in California. Recent changes to California driver licenses and identification cards may result in firearms dealers requiring that holders of a driver license or identification card with the words "Federal Limits Apply" on it provide documentary proof that they are lawfully present in the United States in order to purchase a firearm. This is because federal law prohibits anyone who is not lawfully present in the United States from receiving or possessing a firearm or ammunition.

The Department of Motor Vehicles (DMV) currently issues two types of California driver licenses and identification cards: "REAL ID" and "Federal Limits Apply." Applicants for a "Federal Limits Apply" driver license or identification card are not necessarily required to provide proof of lawful presence to DMV, unlike "REAL ID" applicants.

In today's consumer alert, the California Department of Justice informs consumers that firearms dealers may wish to consider requiring individuals with a "Federal Limits Apply" driver license or identification card to present proof of lawful presence. This may include one of the following documents:

- Valid, unexpired U.S. passport or passport card
- Certified copy of U.S. birth certificate
- U.S. Certificate or Consular Report of Birth Abroad of a U.S. Citizen
- Valid, unexpired foreign passport with valid U.S. immigrant visa and approved Record of Arrival/Departure (I-94) form
- Certified copy of birth certificate from a U.S. Territory
- Certificate of Naturalization or U.S. Citizenship
- Valid, unexpired Permanent Resident Card

Consumers should check with the dealer from whom they plan to purchase a firearm to verify the dealer's identification requirements. Alternatively, consumers can obtain a REAL ID driver license or identification card, which would provide sufficient proof of lawful presence in the United States.

A copy of the consumer alert can be found here.

# # #



**STATE OF CALIFORNIA DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL**

<input type="text"/>	Search
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**WHO WE ARE**

- About AG Xavier Becerra
- History of the Office

Organization of the Office

## WHAT WE DO

Public Safety

Opinions and Quo Warranto

Research

Children & Families

Civil Rights

Consumer Protection

Environment & Public Health

Tobacco Directory

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Agents Fallen in the Line of Duty

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## WHAT WE'RE WORKING ON

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Children's Rights

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# CERTIFICATE OF SERVICE

Case Name: **Rhode v. Becerra**

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

I hereby certify that on August 5, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; DECLARATION OF NELSON R. RICHARDS**

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 August 5, 2019, at Sacramento, California.

Tracie L. Campbell

Declarant

**/s/ Tracie Campbell**

Signature

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