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 REPLY BRIEF

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INTRODUCTION

Before Proposition 63, felons, the dangerously mentally ill, and other prohibited people could go onto the internet or into a gun store and buy as much ammunition as they wanted. California's voters recognized that this presented a public safety concern. They enacted Proposition 63 to address that concern and require background checks for ammunition purchases. Under California's new Ammunition Laws, gun owners with up-to-date records can purchase ammunition using the streamlined Standard Check procedure that costs $1 and takes, on average, a few minutes. Anyone who does not qualify for that procedure may use the Basic Check, which costs $19 and takes, on average, a day or two. These new laws have been effective, blocking more than 750 prohibited people from acquiring ammunition during their first seven months of operation.

The district court erred when it preliminarily enjoined enforcement of the Ammunition Laws. In defending that decision, Plaintiffs do not dispute that California may require individuals who want to purchase ammunition to submit to a background check. They do not appear to take issue with the either the Standard Check or Basic Check procedures, as they are experienced by the vast majority of purchasers. Instead, they argue that the district court correctly enjoined the law because roughly 16% of Standard

Checks were rejected. A Standard Check rejection can mean a number of things, however, and no individual plaintiff claimed to have experienced one. In fact, over a year after they filed their motion in the trial court, Plaintiffs still have not identified a single California resident "complaining that he or she cannot lawfully buy" ammunition because of the Ammunition Laws. *Teixeira v. County of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017) (en banc) (quotation marks omitted). Plaintiffs' Second Amendment claims thus fail at the threshold both because Plaintiffs lack standing to litigate alleged harms experienced by nonparties, and because they cannot bring a facial challenge against a law that they appear to concede is constitutional in the vast majority of its applications.

Plaintiffs also fail to defend the district court's holding that they have a likelihood of success on the merits of their Second Amendment and Commerce Clause claims. Plaintiffs agree that California has an important interest in promoting public safety. Instead, they argue that the Standard Check rejection rate shows that the laws do not sufficiently advance that objective. But Plaintiffs assume, with no evidence, that the rejections are unwarranted, and they ignore evidence that those who have had a Standard Check rejected can take steps to use that streamlined procedure in the future. Plaintiffs also ignore the fact anyone who has a Standard Check rejected

may still purchase ammunition using the Basic Check—which takes substantially less time than the 10-day waiting period to buy firearms that this Court upheld in *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016). Plaintiffs' Commerce Clause arguments similarly rely on misreading the Ammunition Laws and governing case law.

Plaintiffs' inadequate constitutional arguments cannot carry the day on the remaining preliminary injunction factors. Having to go to an ammunition vendor, pay a small fee, and wait for a few minutes does not justify enjoining laws that are actively stopping dangerous prohibited people from having easy access to ammunition. This Court should therefore reverse the district court's preliminary injunction order and, because Plaintiffs' Second Amendment and Commerce Claus claims suffer from manifest, incurable legal defects, direct entry of judgment in the Attorney General's favor.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE CALIFORNIA'S AMMUNITION LAWS

Plaintiffs do not dispute that California may, consistent with the Second Amendment, adopt an "ammunition background check scheme." *See* Appellees' Answering Br. (AB) 26, ECF No. 33. And they recognize that the individual plaintiffs "have not themselves been *precluded* from obtaining

ammunition." AB 35. But they argue that the Ammunition Laws are unconstitutional because they have supposedly prevented "tens of thousands" of Californians from "acquiring the ammunition necessary to exercise the right to keep and bear arms." AB 1. Even assuming that some "law-abiding Californians" have been unable to purchase ammunition because of the challenged laws, not *one* of them is a party to this litigation. To establish Article III standing, a plaintiff must "show 'a personal stake in the outcome of the controversy.'" *Gill v. Whitford*, 138 S.Ct. 1916, 1929 (2018) (citation omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 & n.1 (1992) (an "irreducible constitutional minimum" of standing requires plaintiffs to show that a challenged law injures them in a "personal and individual way"). Plaintiffs fail to make that showing here.

Plaintiffs argue that they can rely on harms that they have not "personally experience[d]" for two reasons. AB 36. Neither is persuasive. First, the individual plaintiffs argue that because they have "expended both money and considerable time" submitting to a background check, they are entitled to "point to anything that is relevant under the legal standards applicable to [their] claims, even things involving the law's undue burden or improper effect on other parties." AB 35. That remarkably broad theory of standing finds no support in either this Court's or the Supreme Court's

precedent; indeed, Plaintiffs' brief cites no such authority in support of their assertion. AB 35. Both courts have, on the contrary, "counseled that standing is not dispensed in gross" and that the standing inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Or. Prescription Drug Monitoring Program v. U.S. D.E.A.*, 860 F.3d 1228, 1233 (9th Cir. 2017) (citations, quotation marks, and brackets omitted). Any other rule would give plaintiffs "aggrieved in one respect" the ability to bring "the whole structure of state administration before the courts for review." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).[1]

Second, Plaintiffs argue that plaintiff California Rifle & Pistol Association has organizational standing because it has "alleged its members were precluded from obtaining ammunition." AB 35. Organizations may of course "'assert standing on behalf of their own members,'" *id.*, but only so long as "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *San Diego Cty. Gun*

[1] Nor do Plaintiffs here invoke other theories of standing—like the overbreadth doctrine or third party standing—that rely on how the statute is "enforced against someone else." *Hightower v. City of Boston*, 693 F.3d 61, 81 (1st Cir. 2012); *see* AB 36 n.5 (expressly disclaiming reliance on overbreadth). Even if they had, those theories would fail. AOB 43-46.

Rights Comm. v. Reno, 98 F.3d 1121, 1130-31 (9th Cir. 1996). Here, the claim that CRPA members have been "prevented or deterred from obtaining ammunition at all," AB 35, cannot be established without a case-by-case evaluation of the facts and circumstances of each person's situation.

For example, CRPA claims to be bringing suit on behalf of members "who have been denied an ammunition transaction" even though they are "not prohibited from owning or possessing firearms." ER 1559. As a preliminary matter, those conclusory statements are not the sort of "specific allegations establishing that at least one *identified* member had suffered or would suffer harm" that courts require for associational standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added). But they also show why participation of CRPA's individual members would be necessary. To start, CRPA's declaration does not explain what it means by "denied." It could mean the member is prohibited (which is how the Attorney General, AOB 10, and district court, ER 19, use the word "deny" in this context). Or it could refer to a Standard Check being *rejected* because the vendor incorrectly entered the purchaser's information—in which case, the vendor can easily correct the error and the transaction may proceed. *See, e.g.*, ER 959. Or it could refer to a Standard Check being *rejected* because the would-be purchaser has not updated her Automated Firearms System

(AFS) record after moving, *see* ER 246-47—in which case, the prospective purchaser can correct the error in a process that may take as little as 10 minutes, ER 949. Numerous other iterations of why an ammunition transaction might be denied or rejected could play out. Some impose virtually no burden on the purchaser, while others may require the expenditure of more time and effort. Those facts matter in a Second Amendment analysis, and Plaintiffs made almost no effort to establish them here.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR SECOND AMENDMENT CLAIM

A. California's Ammunition Laws Are Plainly Valid on Their Face

Plaintiffs contend that the Attorney General's argument that the Ammunition Laws have a "plainly legitimate sweep" reflects a "misunderstanding of the Supreme Court's jurisprudence." AB 30 (citations and quotation marks omitted). But it is plaintiffs who are "profoundly confused." AB 30. They request facial relief because the Ammunition Laws "impose[] the same burdens on *all* Californians who seek to obtain ammunition." AB 32-33. The only burden imposed by the text of the relevant statutes and regulations, however, is a requirement that would-be ammunition purchasers submit certain information to the Department of

Justice and pay a fee of $1 (for the Standard Check) or $19 (for the Basic Check). Cal. Penal Code § 30352; Cal. Code Regs., tit. 11, §§ 4302-03.

Plaintiffs make no argument that these requirements violate the Constitution. Any such assertion would almost certainly be foreclosed by circuit precedent. *See Silvester*, 843 F.3d at 827 (upholding 10-day waiting period for firearms purchasers); *Bauer v. Becerra*, 858 F.3d 1216, 1218, 1222 (9th Cir. 2017) ($5 fee on transfer of firearms does not violate the Second Amendment). Instead, Plaintiffs' Second Amendment claim rests on the assertion that the Ammunition Laws operate as a "ban on ammunition." AB 21. But no such limitation can be found on the face of the challenged laws—except for those "class[es] of persons who are prohibited from owning or possessing ammunition," Cal. Penal Code § 30370(b), who, all parties agree, have "no right to purchase ammunition in the first place," AB 31. Nor have the Ammunition Laws prevented the vast majority of ammunition sales from going forward. During their first seven months of operation, more than half a million purchases were completed after buyers used either the Standard or Basic Check. ER 251-52 & nn.2-5, 255.

Plaintiffs are also wrong that the number of transactions "thwarted" by the Standard Check supports facial relief. AB 33. A Standard Check may be rejected for any number of reasons, including a vendor who enters the wrong

information or a buyer who has not updated her AFS record. *See* AOB 31. Even if a Standard Check is rejected, would-be buyers can complete their purchases by submitting to a Basic Check that costs $19 and takes a day or two and does not require purchasers to "fix whatever problem led" to the Standard Check rejection. AB 34; *see* AOB 8-11 (describing the Basic Check process). While Plaintiffs complain that "prospective ammunition purchasers are not informed" why their Standard Checks were rejected "or how to fix it," AB 34, they ignore those individuals' ability to purchase ammunition using a Basic Check. And while they emphasize that "*more than half*" of those whose Standard Checks are rejected "*have not* gone on to obtain ammunition," AB 34, they offer only speculation, not evidence, about why they have "*not* yet" done so, AB 24.

Nor does this Court's decision in *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014) support Plaintiffs' claim here. *See* AB 30-31. *Jackson* involved a challenge to a "flat prohibition on keeping unsecured handguns in the home" and an absolute prohibition on the sale of hollow-point ammunition. *Jackson*, 746 F.3d at 962, 967. The constitutionality of those laws did not turn on how the government "chooses to enforce it." *Id.* at 962. By contrast, determining whether the Ammunition Laws prevent a person from "acqui[ring] . . . ammunition," AB 20, depends

on a fact-intensive assessment of each person's circumstances and eligibility.

Finally, awaiting "as-applied" challenges to the Ammunition Laws does not present any "profound constitutional and practical concerns." AB 34. On the contrary, requiring a plaintiff to demonstrate that the Ammunition Laws has in fact prevented him or her from procuring ammunition (or substantially burdened that effort) will ensure that courts do not "short circuit the democratic process" on the basis of a "factually barebones record[]." *Jackson*, 746 F.3d at 962 (citation omitted). That course is especially appropriate in this case, where Plaintiffs have not "demonstrate[d] that the legislation 'would be unconstitutional in a large fraction of relevant cases.'" *Id.* (citation omitted).

B. The Ammunition Laws Are Presumptively Lawful Under *Heller*

Plaintiffs also have not shown that the district court correctly analyzed the Second Amendment when it held they had a likelihood of success on the merits. Ammunition background checks are the most obvious way to give effect to the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" that *Heller* recognized as "presumptively lawful regulatory measures." AOB 34 (quoting *District of Columbia v. Heller*, 554

U.S. 570, 626-27 & n.26 (2008).) Background checks can be defended as "restrictions on the possession of firearms by felons and the mentally ill." *Pena v. Lindley*, 898 F.3d 969, 1009 n.19 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (quotation marks omitted). Plaintiffs offer no response to this argument. *See* AB 20-22.

Instead, Plaintiffs focus on *Jackson*'s statement that "*Heller* does not include ammunition regulations in the list of 'presumptively lawful regulations." AB 20 (quoting *Jackson*, 746 F.3d at 968). But *Jackson* made that statement when considering a law that banned the sale of hollow point ammunition. 746 F.3d at 968. It did not consider whether laws that, in effect, ban the purchase of ammunition by felons and other individuals who also may not possess firearms are the among those "presumptively lawful regulatory measures" that a State may adopt. *Heller*, 554 U.S. at 626-67 & n.26.

Plaintiffs are also wrong that there is no evidence supporting this kind of regulation. AB 21. As early as 1923, California required firearms vendors to keep records of firearms sales and transmitted to law enforcement. 1923 Cal. Stat. 699, § 9. California Penal Code section 30352 institutes essentially the same requirements for ammunition. The wait associated with that information being used to conduct a background check under section 30370

is also supported by historical evidence. Waiting periods to purchase firearms have been on the books in California for almost a century. 1923 Cal. Stat. 699, § 10; *see also generally* Amicus Curiae Br. of Everytown at 11-24, ECF No. 20-1.

Plaintiffs offer a similarly cursory response to the Attorney General's alternative argument that ammunition background checks are presumptively lawful "conditions and qualifications on the sale of arms." *Heller*, 554 U.S. at 627 n.26; *see* AOB 36. With a noncommittal turn of phrase—"Whatever *Heller* meant by that passage," AB 21—they dismiss the Supreme Court's limitation on the scope of its holding. They go on to say that the limiting language does not "announce that any and all conditions on the sale of arms . . . escape constitutional scrutiny." AB 21. But the Attorney General never argued that it does. The ammunition background checks at issue here are a condition or qualification on the sale of arms for the same reason the 10-day waiting period for purchasing firearms at issue in *Silvester* was. AOB 36 (citing *Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring)). As Chief Judge Thomas explained, "a condition is something established or agreed upon as a requisite to the doing or taking effect of something else; a stipulation or provision." *Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (brackets and quotation marks omitted). "[A] qualification is a

condition precedent that must be complied with for the attainment of a status, the perfection of a right, etc., or for admission to an office." *Id.* at 830 (brackets, quotation marks, and ellipses omitted). A background check is just such a "requisite" or "condition precedent" to purchase a firearm or ammunition. *See id.* The check ensures that the person purchasing the ammunition is not prohibited from it. Plaintiffs offer no competing, let alone compelling, alternative reading of the standard announced in *Heller*.

C. The Ammunition Laws Promote California's Compelling Interest in Public Safety

Even if the Ammunition Laws implicate the Second Amendment, intermediate scrutiny applies because the Ammunition Laws do not place a substantial burden on Second Amendment rights. AOB 37 (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)).[2] The Ammunition Laws easily withstand review under that standard because they are

[2] A panel of this Court recently concluded that this Court had "been inconsistent in its application" of the intermediate scrutiny standard. *Duncan v. Becerra*, No. 19-55376, 2020 WL 4730668, at *24 (9th Cir. Aug. 14, 2020). As explained in the Attorney General's recently filed petition for rehearing en banc in that case, that description of this Court's Second Amendment precedents is wrong. Pet. for Reh'g En Banc, *Duncan v. Becerra*, No. 19-55376 (9th Cir. Aug. 28, 2020), ECF No. 100.

reasonably fit to California's important—and indeed compelling—interest in protecting public safety. AOB 38-39.

Plaintiffs concede the importance of California's objective in keeping ammunition out of the hands of felons, the dangerously mentally ill, and other prohibited people. AB 22-23, ER 1622. They dispute only whether the Ammunition Laws have a reasonable fit with California's compelling interest in public safety. AB 23-30. They contend, principally, that because 16% of Standard Checks were rejected from July 2019 through January 2020, the fit cannot be reasonable. AB 26-27. This argument suffers from four flaws.

First, Plaintiffs apply the wrong legal standard. Despite a large body of well-developed precedent in this Circuit, Plaintiffs do not cite even one of this Court's Second Amendment cases in their eight-page discussion of the fit requirement. AB 23-30. To withstand intermediate scrutiny, "the statute simply needs to promote a substantial government interest that would be achieved less effectively absent the regulation." *Mai v. United States*, 952 F.3d 1106, 1116 (9th Cir. 2020) (quoting *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019)). "The test is not a strict one." *Silvester*, 843 F.3d at 827. Plaintiffs framework, which divides the fit analysis into "sufficiently

tailored" and "substantially related" prongs, does not follow this Court's precedent. *See* AB 23-27.

The Ammunition Laws satisfy this Court's fit standard. They stop prohibited people from buying ammunition from California's roughly 2,000 ammunition vendors. ER 946. As the voters who adopted Proposition 63 found when they enacted the Ammunition Laws, "any violent felon or dangerously mentally ill person [could] walk into a sporting goods store or gun shop in California and buy ammunition, no questions asked." ER 1693. Experience in California and elsewhere confirmed widespread purchases of ammunition by felons and other prohibited people. *See* ER 612, 624, 647. This evidence shows that absent ammunition background checks, prohibited people buy ammunition from gun stores and other vendors. The fit between the ammunition background checks and prohibited people not obtaining ammunition is thus clear and direct. It is at least as tailored as the 10-day waiting period upheld in *Silvester*, the handgun-storage requirement and hollow-point ammunition sale prohibition upheld in *Jackson*, and the handgun safety requirements upheld in *Pena*. *See Silvester*, 843 F.3d at 828-29; *Jackson*, 746 F.3d at 966; *Pena*, 898 F.3d at 981-82, 985-86.

Post-implementation evidence confirms that conclusion. But for the Ammunition laws, over 750 prohibited people—including people with

violent felony convictions, domestic violence convictions, and mental health commitments—would have purchased ammunition. ER 237, 248-49, 251, 255, 404. Countless other prohibited people likely were, and continue to be, deterred from even trying to purchase ammunition. *Cf. Silvester*, 843 F.3d at 828 (relying on the "common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down"). The fit between the ammunition background checks and prohibited people not obtaining ammunition is thus clear and direct. Rather than considering the relevant evidence and controlling precedent, Plaintiffs focus on the number of Standard Checks rejected. *See, e.g.*, AB 23-25. But in the context of a facial challenge like this one, the intermediate scrutiny analysis asks only whether the evidence "fairly supports" lawmakers' conclusion that it will advance the government's asserted interest. *Jackson*, 746 F.3d at 969; *Mai*, 952 F.3d at 1118 (same).

Second, Plaintiffs mischaracterize the evidence on the Ammunition Laws' implementation. They contend that the Standard Check process "erroneously rejects 16% of those" who apply, AB 22, and has a "remarkable false positive rate," AB 23. That is incorrect. A Standard Check rejection is not a false positive—i.e., a mistaken determination that the purchaser is prohibited. To conduct a Standard Check, the law requires the

purchaser's "name, date of birth, current address, and [ID] number" to "match an AFS entry[.]" Cal. Pen. Code § 30370(b). Thus, as the Attorney General's witness from the Bureau of Firearms explained, "[b]y definition, [a Standard] Check will work only for those who have an AFS record, and whose record is up to date." ER 242. For those who do not have a record or whose record is not up to date, a Standard Check "rejection . . . is not a determination that the purchaser is ineligible to purchase ammunition. They may still use a Basic Check[.]" ER 242.

Contrary to Plaintiffs' assertion, then, rejections are evidence that the system works. For example, if a purchaser has no record in the AFS—as is the case in roughly a quarter of all rejections, ER 256—then there is no record that could have been flagged by the Armed Prohibited Person System, and no way other than a Basic Check to tell whether the purchaser is prohibited. *See* ER 238-39, 394-398, 948-50. Similarly, if someone's address on his ID does not match his AFS record, that may interfere with Armed Prohibited Persons System enforcement efforts. Moreover, discrepancies between a person's AFS record and his current information can be addressed, meaning that anyone who wants to can use the Standard Check. *See* ER 948-49. For most, it will be a one-time effort that takes a couple of days, or a week or two. *See, e.g.*, ER 310-11 (describing successful

attempt to update record); ER 314-16 (describing successful attempt to create AFS record and then use Standard Check process). For a few, it may take longer—though this is just speculation, as no evidence in the record shows such people exist. Those people, to the extent any exist, can use the Basic Check while they update their AFS records.

Third, Plaintiffs defend the district court's decision by pointing to a study from the California Firearm Violence Research Center. AB 28-29. But that study merely "*suggest[ed]* that the simultaneous implementation of" California's firearm background check law and prohibition on possession for domestic violence misdemeanants "did not result in population level changes in the rates of firearm-related homicides and suicides in California" for the years 1991 through 2000. ER 562 (emphasis added). Plaintiffs do not explain why an inconclusive study looking at data on firearms laws implemented during the 1990s has any relevance to the implementation of the Ammunition Laws in the 2020s. Indeed, the study's authors explained that it was "important to note that the quality and completeness of the records on which background checks are preformed have improved since our study period." ER 561. The authors advised that "[i]ncreased 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." ER 561. And even assuming, for the sake of argument, that the study supported Plaintiffs' view of background check laws, courts "must allow the government to select among reasonable alternatives in its policy decisions" in the face of "conflicting legislative evidence." *Pena*, 898 F.3d at 980; *accord Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) ("[C]onflicting empirical evidence . . . does not suggest, let alone compel, a conclusion that the 'fit' between [New Jersey's public carry law] and public safety is not 'reasonable'[.]"); *Kachalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012) ("It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.").

Fourth, Plaintiffs fault the Attorney General for not explaining why purchasers must submit an ID that confirms lawful status in the United States. AB 26-27; Cal. Code Regs., tit. 11, § 4045.1. The reason is obvious: federal law prohibits individuals who do not have lawful status in the United States from possessing ammunition, 18 U.S.C. § 922(g)(5), and the ID regulation helps effectuate that prohibition. Requiring individuals to obtain the kind of ID that will be required to fly on airplane starting in October 2021, 85 Fed. Reg. 23502 (Apr. 27, 2020), before obtaining ammunition hardly imposes a burden of constitutional concern—particularly where the

regulation allows purchasers to use alternative forms of identification, *see* Cal. Code Regs., tit. 11, § 4045.1.

All told, Plaintiffs' various Second Amendment challenges to the Ammunition Laws come up short as a matter of law. This Court should therefore not only reverse the district court's decision, but also resolve the merits of the Second Amendment claim in favor of the Attorney General. *See* AOB 40 (citing *California v. Azar*, 950 F.3d 1067, 1082 (9th Cir. 2020) (en banc)).

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR DORMANT COMMERCE CLAUSE CLAIM

A. The Ammunition Laws Do Not Discriminate Against Interstate Commerce

The Ammunition Laws are not facially discriminatory, and do not have a discriminatory purpose or effect. In all respects, the Ammunition Laws, and specifically Penal Code sections 30312 and 30314, treat ammunition sellers the same, regardless of where the seller is located. *See Assn. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013) ("[A] statute that treats all private companies exactly the same does not discriminate against interstate commerce," (quotation marks omitted)). Any seller—whether in-state or out-of-state—that wishes to sell ammunition to a buyer in California must do so through a California-

licensed vendor who is able to process the transfer of ammunition in a face-to-face transaction. *See* Cal. Pen. Code § 30312(a)-(b). It does not matter whether a buyer in Sacramento purchases ammunition from a seller in Reno, Nevada, or one in Los Angeles, California. Regardless of where the seller is located, if the seller is not a licensed vendor or cannot transfer the ammunition in a face-to-face transaction, the ammunition will need to be first delivered to a licensed vendor who can do so. *Id.*

Plaintiffs argue that the Ammunition Laws discriminate against interstate commerce because they favor "California resident businesses." ER 103; AB 37. That is incorrect. A seller's residency or physical location is irrelevant to the application of the Ammunition Laws.[3] The face-to-face requirement for ammunition delivery applies regardless of the seller's location. It only matters whether the seller possesses a California license and is able to deliver the purchased ammunition to the buyer in person.

[3] For this reason, the district court's reliance on *Nationwide Biweekly Administration, Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017), is misplaced. AOB 52-53. Plaintiffs argue that the district court's reference to the term "residency" meant "physical presence." AB 40. Plaintiffs' argument is belied by the district court's reliance on the case, which used the term "residency" in the legal sense discussed in the Opening Brief. *See* AOB 52-53.

Plaintiffs' attempt to characterize the Ammunition Laws as an effort to "'hoard a local' market 'for the benefit of local businesses'" plainly fails. AB 41 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387 (1994)) (quotation marks omitted). In *C & A Carbone*, for example, the Supreme Court found a city's waste-flow control ordinance to be a protectionist regulation that "ensures that the town-sponsored facility will be profitable"—a regulation that the Court characterized as a "financing measure" for the city. *C & A Carbone*, 511 U.S. at 393. That law stands in sharp contrast to the Ammunition Laws, which were passed to enhance public safety by requiring licensed vendors to confirm that the buyer is not prohibited from acquiring ammunition. ER 1687, 1693 (the intent of Proposition 64 is "[t]o ensure that those who buy ammunition in California—just like those who buy firearms—are subject to background checks"); *see also* AOB 4-5.

Dean Milk and *Granholm*, upon which Plaintiffs rely heavily, are similarly distinguishable. AB 42-43. Significantly, the Supreme Court found the challenged regulations in *Dean Milk* and *Granholm* to be protectionist measures. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) ("In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates

against interstate commerce."); *Granholm v. Heald*, 544 U.S. 460, 473-74 (2005) (identifying the "patchwork of laws" across the country, of which the challenged law was one, as "essentially the product of an ongoing, low-level trade war"). The Court invalidated the measures based on the principle that "[s]tates may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Granholm*, 544 U.S. at 472. The Ammunition Laws are not such laws.

Dean Milk and *Granholm* are also distinguishable on their facts. The challenged law in *Dean Milk* barred the sale of product produced outside the prescribed local area. *Dean Milk Co.*, 340 U.S. at 355. Here, by contrast, out-of-state sellers may continue to sell into California. In *Granholm*, the challenged laws subjected out-of-state wineries with restrictions not applicable to in-state wineries. *Granholm*, 544 U.S. at 473-74. Here, by contrast, the Ammunition Laws apply equally to both in-state and out-of-state sellers.

Plaintiffs also argue that the Ammunition Laws discriminate against interstate commerce because California-licensed vendors may charge a fee to process ammunition purchases from out-of-state sellers. AB 41. But the requirement that an ammunition transaction be conducted through a California-licensed vendor in a face-to-face transaction applies equally to

both in-state and out-of-state sellers. And permitting a licensed vendor to charge sellers a fee to process face-to-face transactions that the seller would not be able to complete is permissible under the Commerce Clause. *Dean Milk* illustrates this point. There, the Court opined that if the city wished its own personnel to inspect milk produced by distant producers in order to protect local interests and health and safety, the city could have charged importing producers the actual and reasonable costs for inspection. *See Dean Milk*, 340 U.S. at 355. There is no showing that the administrative fee that a California-licensed vendor may charge to complete face-to-face ammunition transactions creates some burden on ammunition purchasers that exceeds that of the inspection fee deemed permissible in *Dean Milk*. Thus, rather than evidence of discrimination, section 30312's provisions authorizing sales by out-of-state vendors through a California-licensed vendor, for a fee, supports a holding that the Ammunition Laws do not violate the dormant Commerce Clause.[4]

[4] Permitting out-of-state purchases of ammunition to be completed through a California-licensed vendor also means that the Ammunition Laws are more permissive than the law upheld by the New York district court, which flatly banned internet sale of ammunition. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 357 (W.D.N.Y. 2013), *aff'd in part, rev'd in part*, 804 F.3d 242 (2d Cir. 2015).

Plaintiffs' assertion that the Ammunition Laws have a discriminatory effect also fails. AB 18. As an initial matter, because the Ammunition Laws are not facially discriminatory (and there is no allegation that they have a discriminatory purpose), Plaintiffs must provide "substantial evidence of actual discriminatory effect." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 405 (9th Cir. 2015) (quotation marks omitted) ("[A] plaintiff must satisfy a higher evidentiary burden when, as here, a statute is neither facially discriminatory nor motivated by an impermissible purpose."). Although Plaintiffs acknowledge this burden, AB 43, they fail to meet it. Nor could they, because the Ammunition Laws have the same economic effect on out-of-state ammunition sellers and their similarly situated in-state counterparts.

"To determine whether the laws have a discriminatory effect it is necessary to compare [the out-of-state entity] with a similarly situated in-state entity." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). In *LensCrafters*, this Court held that a law that treated opticians differently from optometrists does not have discriminatory effect because opticians and optometrists are not "similarly situated." *Id.* at 527. This Court found that even though opticians and optometrists compete in the same market, optometrists have special

responsibilities as health care providers that opticians do not. *Id.* Similarly, out-of-state sellers do not have the same responsibilities as California-licensed in-state vendors. California-licensed vendors must conduct background checks. Cal. Penal Code §§ 30352, 30370. And they are subject to California's licensing laws. Cal. Pen. Code § 30385; *see id.* §§ 30342-65. California-licensed vendors who violate their legal obligations may be guilty of a misdemeanor. *Id.* §§ 30300, 30306, 30365(a). California-licensed vendors are also subject to inspection at any time by California law-enforcement agencies. *Id.* §§ 30357, 30362. Out-of-state sellers are not subject to these obligations and are thus not "similarly situated" to California-licensed vendors. Thus, the Ammunition Laws are not discriminatory.[5]

Even assuming the Ammunition Laws are discriminatory (which they are not), they would not violate the dormant Commerce Clause because there are no reasonable alternatives to further the State's interests. "[A] State

[5] The district court erred in concluding that the Ammunition Laws "significantly burden[] interstate commerce" based not on "substantial evidence" but on the court's "inferences." AOB 57; ER 104. Plaintiffs do not appear to dispute this contention. Because Plaintiffs failed to show that the Ammunition Laws place any burden, much less a "significant burden" on interstate commerce, the Court need not assess the laws' putative benefit. *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155-56 (9th Cir. 2012).

may discriminate against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). California voters passed Proposition 63 to ensure that ammunition purchasers pass background checks so that prohibited persons do not receive ammunition. ER 1693. Plaintiffs offer no reasonable alternative to achieving California's compelling public-safety objective.

B. The Ammunition Laws Do Not Regulate Transactions that Occur Wholly Outside of California

The district court did not conduct an extraterritoriality analysis. AOB 48 n.10. While Plaintiffs contend that it did, AB 45, the absence of any analysis is plain, ER 102-04. Plaintiffs contend further that the district court "clearly held that California's scheme likely violates the prohibition on extraterritorial regulation." AB 45 (citing ER 102-04). Regardless of the holding's clarity, it was erroneous, as Plaintiffs' attempt to defend it shows. They argue, incorrectly, that sections 30312 and 30314 "commandeer out-of-state transactions just because they involve a California resident." AB 47. And they deploy a flawed hypothetical in service of that reasoning: "if a California resident travels to Nevada and purchases ammunition through a face-to-face transaction with a Nevada seller who possesses the same federal

license as a California Vendor, California still requires that ammunition to be shipped to a California Vendor before it can be delivered to the purchaser." *Id*. at 44-45. But no law *requires* the California resident to ship ammunition purchased outside of the State into the State. That resident may use the ammunition in Nevada—or anywhere else that is not California—however he wants (consistent with federal, state, and local laws). Contrary to Plaintiffs' suggestion, AB 46, neither section 30312 nor section 30314 regulates the purchase of the ammunition in Nevada. It is only when the California resident wants to "bring or transport into this state any ammunition that he or she purchased or otherwise obtained from outside this state" that the ammunition must be delivered to a licensed ammunition vendor so a background check may be conducted. *See* Cal. Pen. Code § 30314(a). Under Plaintiffs' theory, Californians could evade state regulation of any good by purchasing the good in a state that does not regulate it and then shipping it to themselves in California. That view of the dormant Commerce Clause has no support in the law. *See, e.g.*, *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145-46 (9th Cir. 2015)

(upholding law prohibiting sale, distribution, and possession of shark fins against extraterritoriality challenge).

Contrary to Plaintiffs' argument, *Sam Francis Foundation v. Christies*, 784 F.3d 1320 (9th Cir. 2015) (en banc), is inapposite. *See* AB 46-47. In *Sam Francis*, this Court invalidated a law that required payment of royalties when a California resident sells fine art, even if the resident was not in the State when selling the art and the art never enters the State. *Sam Francis*, 784 F.3d at 1323. This Court explained how the law regulated extraterritorially by way of an example. A California resident with an apartment in New York who buys a sculpture in New York from a North Dakota artist and who later sells the sculpture to a friend in New York would have to pay a royalty to the North Dakota artist "even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California." *Id.* Here, by contrast, sections 30312 and 30314 apply only when ammunition enters California.

Plaintiffs' reliance on *Daniel Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018), fails for the same reason. AB 44-45. In that case, this Court was "not concerned [] with an attempt by the Department officials to protect California and its residents by applying [state law] to products that are brought into or are otherwise within the borders of the State." *Daniel*

Sharpsmart, 889 F.3d at 615. Rather, the state law in *Daniel Sharpsmart* was an attempt to "control transactions that occur wholly outside the State after the material in questions . . . has been removed from the State." *Id.* The Ammunition Laws are different; they apply only to "products that are brought into or are otherwise within the borders of the State." *Id.*; Cal. Pen. Code §§ 30312, 30314.

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST TIP OVERWHELMINGLY IN CALIFORNIA'S FAVOR

As the Attorney General argued in his Opening Brief, this Court need not reach the remaining preliminary injunction factors because Plaintiffs cannot establish a likelihood of success on the merits. AOB 59 (citing *Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019)). Plaintiffs address these remaining factors only briefly. AB 48-50.

The individual plaintiffs do not identify any tangible or specific harm that they have experienced because of the Ammunition Laws. Five of the seven did not even submit evidence about the effect the laws had on them. Of the two who submitted declarations, one did not even mention the background check process, and the other successfully purchased ammunition using a Standard Check. ER 1544, 1547. Rather than submitting evidence of the individual plaintiffs' experiences, Plaintiffs rely on threadbare recitals

offered by CRPA—none of which describes the experience of an actual, identifiable person. AB 49 (citing ER 1157-60). The CRPA declaration cannot establish irreparable harm because it is "conclusory and without sufficient support in facts." *See Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985).

On the dormant Commerce Clause claim, Plaintiffs attempt to justify their delay in seeking injunctive relief by arguing that their "injury radically worsened in July 2019[.]" AB 50. The evidence Plaintiffs cite, however, does not support their assertion. Almost all the change in the out-of-state business plaintiffs' California sales followed the January 1, 2018 effective date of the restrictions on direct shipment. *See* ER 1550 (stating that California business dropped from 22.2% in 2017 to 2.8% in 2018); ER 1554 (identifying 95% drop in sales between 2017 and 2018).

Taken together, the equities and the public interest pit California's compelling interest in keeping ammunition out of the hands of prohibited people against Plaintiffs' assertions of slight inconveniences. The individual plaintiffs have to pay $1 and wait a few minutes to purchase ammunition, while the out-of-state business plaintiffs defend a business model of direct-to-customer ammunition sales that is essentially outlawed for firearms. *See, e.g.*, 18 U.S.C. § 922(a)(3); 27 U.S.C. § 478.99. As of the filing of this brief,

the Ammunition Laws have been in effect for 14 months. In their first seven, they stopped over 750 prohibited people from purchasing ammunition and undoubtedly deterred countless others. *See* ER 237, 248-49, 251, 255. No sound reason supports Plaintiffs' position that prohibited people should be given easy access to ammunition just so Plaintiffs can avoid a $1 fee and a short wait.

CONCLUSION

This Court should reverse the district court's April 23, 2020 order entering a preliminary injunction and order judgment entered in favor of the Attorney General on the Second Amendment and dormant Commerce Clause claims.

Dated: August 31, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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