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 SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S SEPTEMBER 23, 2020 ORDER

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

NELSON R. RICHARDS
Deputy Attorney General
State Bar No. 246996
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7867
Fax: (916) 324-8835
Email: Nelson.Richards@doj.ca.gov
Attorneys for Defendant-Appellant

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INTRODUCTION

This Country has a long tradition of regulating the sale of firearms and ammunition to keep them out of the hands of prohibited people. Starting in the early 20th century, numerous states enacted laws requiring handgun vendors to be licensed and to keep sales records identifying the purchaser. A wait of a day or two was also required, so law enforcement could make sure the purchaser was not a prohibited person. California's Ammunition Laws follow that tradition. They require licensing, recordkeeping, a short wait, and law enforcement review. They use the same approach as earlier laws to achieve the same end: keeping weapons out of the hands of prohibited people. A prohibited person who doesn't have a gun and prohibited person who doesn't have bullets both pose a reduced threat to the public. The district court thus erred when it held that California's ammunition background check "has no historical pedigree." ER 54.

ARGUMENT

This Court uses a two-step inquiry to review Second Amendment claims. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). The Court "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id.* Analysis of whether a challenged law is "presumptively lawful regulatory measures" falls within step one. *See id.*; *Jackson v. City & County of San Francisco*, 746 F.3d 953,

960 (9th Cir. 2014). Examples of presumptively lawful regulatory measures include "longstanding . . . prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010) (plurality) (quotation marks omitted); *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008) (identifying "examples" of presumptively lawful measures, not an "exhaustive" list). The Court looks for "persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson*, 746 F.3d at 960. Section I of this brief explains the parameters of the historical evidence courts consider. Section II shows that the Ammunition Laws fall outside the scope of the Second Amendment.

I. STEP ONE OF THE *HELLER* ANALYSIS LOOKS TO HISTORY AND PRACTICE

A. Laws with Origins in the 20th Century Provide Persuasive Historical Evidence

When considering whether a regulation falls outside the scope of the Second Amendment, this Court will consider history ranging from medieval England to the early of the 20th century. *See Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (concluding that "early twentieth century regulations might . . . demonstrate

a history of longstanding regulation"); *Peruta v. County of San Diego*, 824 F.3d 919, 929 (9th Cir. 2016) (en banc) (considering history as early as 1299).[1] Chief Judge Thomas relied on California's 1923 firearms law when he concluded that California's 10-day waiting period was longstanding, and thus presumptively lawful. *Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016) (Thomas, C.J., concurring); *see also Pena v. Lindley*, 898 F.3d 969, 1003 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (noting that laws from the early 20th century can be longstanding). Other courts of appeals have taken a similar approach. For example, the D.C. Circuit looked to New York's 1911 Sullivan Law and laws enacted across the nation in the 1920s when it upheld the District of

[1] Historical evidence is not always necessary to resolve a case at step one. In *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), this Court upheld an ordinance requiring gun show vendors to secure firearms using a "sturdy cable attaching the firearm to a fixture, such as a table . . . much as cell phones, cameras, and other attractive items are generally displayed for sale" as a "minimal[]" condition or qualification on the commercial sale of arms that fell outside the Second Amendment. *Id.* at 1044 (citing *Heller*, 554 U.S. 626-27). For reasons set forth in the Attorney General's Opening Brief, the burden imposed on most purchasers of producing an ID, paying $1, and waiting a few minutes is a similar de minimis condition or qualification on the commercial sale of ammunition. *See* AOB 29.

Columbia's basic handgun registration requirement as longstanding. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253-54 (D.C. Cir. 2011).[2]

Considering early 20th century laws is also consistent with the examples of longstanding laws listed in *Heller*. *See Heller*, 554 U.S. at 626-27. Congress enacted the bans on felons and the mentally ill possessing firearms in the mid-20th Century. *NRA*, 700 F.3d at 196. The federal ban on felons was enacted in 1938, and expanded to cover nonviolent felonies in 1961. *United States v. Booker*, 644 F.3d 12, 23-24 (1st Cir. 2011). ("[T]he modern federal felony firearm disqualification law, 18 U.S.C. § 922(g)(1), is firmly rooted in the twentieth century[.]"). And Congress enacted the ban on firearms possession by people who have been adjudicated mentally ill in 1968. *United States v. Skoien*, 614 F.3d 638, 640-41 (7th Cir. 2010) (en banc). Most current laws imposing conditions and qualifications on the commercial sale of arms have their origins in the 20th Century. *See* Lee Kennett & James LaVerne Anderson, *The Gun in America* 175 (1975) (noting that New York's 1911 "Sullivan Law was a statute without

[2] *See also, e.g.*, *NRA v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012) (concluding noted that laws "of mid-20th century vintage" can be longstanding under *Heller*); *Drake v. Filko*, 724 F.3d 426, 433-34 (3d Cir. 2013) (concluding that New Jersey's 1924 law requiring a permit to carry a handgun was longstanding).

precedent in the United States, since it subjected to strict regulation not only the carrying of deadly weapons, but also their sale and simple possession").[3]

B. Laws May Be Upheld as Longstanding Regulations if they Are Reasonably Analogous to Laws in Earlier Historical Periods

The requirement that a law be longstanding does not mean that there must be an identical provision on the books at some fixed point in time. Rather, as decisions from this Court and other courts of appeals show, laws that are reasonably analogous to laws that have long gone unquestioned will satisfy the standard. The level of generality is moderate. Thus, even if the Court views the Ammunition Laws as different from laws regulating the sale of firearms, the

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[3] *See also* Carlton F. W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1379 (2009) ("The commercial restrictions with which we are most familiar are . . . almost entirely twentieth-century innovations."); Adam Winkler, *Heller's Catch-22*, 56 U.C.L.A. L. Rev. 1551, 1553 (2009) ("Licensing of gun dealers, mandatory background checks, and waiting periods on gun purchases first arose in the twentieth century."); David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 Harv. J. on Legis. 303, 336 (2016) ("Until the early twentieth century, there were no laws that required that individuals receive government permission before purchasing or borrowing a firearm."); *see generally* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506-16 (2004) (surveying firearms regulations from the founding era through the 19th century). Some regulations date from earlier periods. For example, prohibitions on the sale of firearms and ammunition to certain forbidden persons appear to date back to the colonial era. *See Teixeira v. County of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc).

Ammunition Laws are sufficiently analogous to longstanding firearms regulations to fall outside the Scope of the Second Amendment.

This Court's decision in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), provides guidance. It analogized the federal ban on felons possessing firearms to historical evidence of the founding era showing that the "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)." *Id.* at 1118 (quotation marks and brackets omitted). Similarly, Chief Judge Thomas concluded that California's 10-day waiting period was longstanding when the State's first waiting period, enacted in 1923, was one day. *See Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (discussing "waiting periods" collectively from 1923 from the present without consideration of their length); *see also id.* at 824 (noting that the waiting period expanded to three days in 1955, five days in 1965, and 15 days in 1975, before settling on 10 days in 1991). This approach honors the Supreme Court's assurance in *McDonald* that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *See McDonald*, 561 U.S. at 784 (plurality) (quotation marks omitted).

Then-Judge Kavanaugh's dissenting opinion in *Heller II* comports well with this Court's approach in *Vongxay* and Chief Judge Thomas's *Silvester* concurrence. In *Heller II*, Judge Kavanaugh reasoned that "when legislatures seek to address

new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations." *Heller II*, 670 F.3d at 1276 (Kavanaugh, J., dissenting). He recognized that constitutional principles apply "not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers." *Id.* And he cited a case from the Fourth Amendment context, *California v. Ciraolo*, 476 U.S. 207 (1986), to make his point. In *Ciraolo*, the Supreme Court approved the use of airplanes to surveil property by analogizing to the "common-law principle that police could look at property when passing homes on public thoroughfares." *Heller II*, 670 F.3d at 1275. The historical Second Amendment analysis is thus not limited to only laws on the books at some specific date, but also to "analogues" to those laws that deal with "modern weapons and new circumstances." *Id.* at 1271; *see also Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (considering a law's "close and longstanding cousins").[4]

[4] This approach also looks like the one Chief Justice Roberts had in mind during the oral argument in *Heller*, when he suggested that if "lineal descendents of . . . arms" receive Second Amendment protection then "presumably . . . lineal descendents of . . . restrictions" will fall outside the scope of the Second Amendment. *See* Tr. of Oral Arg. at 77, *District of Columbia v. Heller*, 554 U.S. 570 (2006) (No. 07-290).

The Fifth Circuit's analysis in *NRA*, where the court upheld the federal ban on the sale of handguns to people under the age of 21, provides yet another example. *NRA*, 700 F.3d at 203. Although no founding-era or 19th-century laws prohibited the sale of firearms to those over the age of 18, *id.* at 201, the federal prohibition was "consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety," *id.* at 203.

II. PERSUASIVE HISTORICAL EVIDENCE SHOWS THAT CALIFORNIA'S AMMUNITION LAWS ARE PART OF A LONGSTANDING REGULATORY PRACTICE

The Ammunition Laws constitute conditions and qualifications on the commercial sale of arms. *See Silvester*, 843 F.3d at 830 (Thomas, C.J., concurring) ("On its face, California's waiting period law is a condition or qualification on the sale of guns[.]"). In the alternative, the Ammunition Laws give effect to longstanding bans on prohibited people possessing arms. *See Pena*, 898 F.3d at 1009 & n.19 (Bybee, J., concurring in part and dissenting in part). Regardless of which category they fall into (and they can fall into both), the Ammunition Laws are part of a longstanding tradition. By the mid-1930s, 21 states, as well as the District of Columbia and the Territory of Hawaii, had enacted laws regulating the sale of firearms and, in some cases, ammunition.[5] The Ammunition Laws are

[5] In rough chronological order, these jurisdictions are: Colorado, Delaware, New York, Oregon, California, Montana, North Carolina, Missouri, Massachusetts,

consistent with that historical tradition of regulating firearms and ammunition sales for the sake of public safety. Each provision has a direct antecedent in early 20th century firearms laws. The Ammunition Laws are sufficiently analogous to those early 20th century laws to fall outside the scope of the Second Amendment under step one of the *Heller* analysis. *See Jackson*, 746 F.3d at 960. The district court's finding that "an ammunition background check has no historical pedigree," ER 54, is thus erroneous.

A. States Began Consistently Regulating the Sales of Firearms and Ammunition in the Early 20th Century

Comprehensive laws imposing conditions and qualifications on the sale of firearms and ammunition first started to appear in the early 1900s. Kennett & James, *supra*, at 165-80. South Carolina, for example, passed a law in 1905 authorizing town commissioners to enact ordinances regulating the sale of firearms

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Arkansas, Connecticut, North Dakota, New Hampshire, the Territory of Hawaii, West Virginia, Indiana, Virginia, Michigan, New Jersey, Texas, the District of Columbia, South Dakota, Washington, and Alabama. 1911 Col. Sess. laws 408; 1911 Del. Laws, Chapter 15; 1911 New York Sess. Laws 442; 1913 Or. Laws 497; 1917 Cal. Stat. 221; 1918 Mont. Laws 6 (extraordinary session); 1919 N.C. Sess. Laws 397; 1921 Mo. Laws 691; 1922 Mass. Acts 557; 1923 Ark. Acts 379, 380; 1923 Conn. Pub. Acts 3707; 1923 N.D. Laws 379; 1923 N.H. Laws 138; 1925 Haw. Sess. Laws 790; 1925 Ind. Acts 495; 1925 W. Va. Acts 32; 1926 Va. Acts 285; 1927 Mich. Pub. Acts 887; 1927 N.J. Laws 742; 1931 Tex. Gen. Laws 447; 47 Stat. 650 (1932) (District of Columbia); 1935 S.D. Sess. Laws 355; 1935 Wash. Sess. Laws 599; 1936 Ala. Laws 51. Over time, some of these laws were amended or repealed. *See, e.g.*, 1925 Ark. Acts 1047 (repealing Arkansas's 1923 law).

and ammunition. 1905 N.C. Sess. Laws 545, 547. These longstanding laws themselves picked up a tradition, dating at least to the 17th century, of restricting the sale of firearms and ammunition to prohibited groups. *See Teixeira*, 873 F.3d at 685.[6] Although the laws differed in some ways, for the most part, they required licensing of handgun vendors, recordkeeping, law enforcement review of transactions, and a waiting period. *See, e.g.*, 1923 Cal. Stat. 695, 696-97.

Foremost among the early 20th century enactments was New York's 1911 Sullivan Law. *See* Kennett & James, *supra*, at 175-80. The law required a permit to purchase a handgun, which the purchaser had to produce at the time of transfer. 1911 New York Sess. Laws 442, 444-45. Handgun sellers were required to keep a register documenting both the purchaser's name, age, occupation, and residence, and information about the handgun, including make, model, and manufacturer's number. *Id.* Several other states—Delaware, Colorado, Oregon, Montana, North Carolina, Missouri, and Arkansas—enacted laws similar to New York's. *See* 26 Del. Laws 28 (1911); 1911 Col. Sess. laws 408; 1913 Or. Laws 497; 1918 Mont.

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[6] *Teixeira* identified colonial restrictions on sales of firearms and ammunition to Indians. *Teixeira*, 873 F.3d at 685. "At the time such discriminatory laws were adopted, the fledgling Nation was treating our ancestral inhabitants as if they were convicted felons or illegal aliens, who today are still banned by law from possessing or acquiring firearms." *Id.* at 694 (Tallman, J., concurring in part and dissenting in part). Connecticut "banned the sale of firearms by its residents outside the colony," and Virginia had a similar restriction. *See id.* at 685 & n.18 (majority opinion).

Laws 6 (extraordinary session); 1919 N.C. Sess. Laws 397; 1921 Mo. Laws 691; 1923 Ark. Acts 379. In 1917, California passed its own law regulating the sale of handguns. 1917 Cal. Stat. 221.

In response to state efforts to regulate the sale of firearms, an organization known as the United States Revolver Association advocated for a uniform firearms act. Kopel, *supra*, at 347. The Revolver Association's proposed law was based on a bill introduced to Congress to regulate firearms in Washington, D.C. *See A Bill to Provide for the Uniform Regulation of Revolver Sales* (citing S. 4012, 67th Cong. (1922)), *reprinted in* Handbook of the National Conference of Commissioners on Uniform State Laws, 34th Ann. Conf., 728-32 (1924) (1924 Conference Report). The proposed law banned non-citizens and criminals from possessing handguns. *Id.* at 729. It prohibited sales of pistols to minors. *Id.* at 730. And it required vendors to keep records of the transaction and purchaser's identity, including name, occupation, and address; submit copies of that information to law enforcement; and wait a day before delivering the handgun to the purchaser. *Id.* The law did not adopt the Sullivan Act's permit-to-purchase policy. *See* United States Revolver Association, *The Argument for a Uniform Revolver Law*, *reprinted in* 1924 Conference Report, *supra*, at 718-19.

In 1923, California repealed its 1917 law and replaced it with a law based on the Revolver Association's proposed law. 1923 Cal. Stat. 695, 696-97. Around the

same time, Connecticut, North Dakota, New Hampshire, Indiana, and Oregon also enacted versions of the law. *See* 1923 Conn. Pub. Acts 3707, 3707-10; 1923 N.D. Laws 379, 380-82; 1923 N.H. Laws 138, 138-39; 1925 Ind. Acts 495, 495-98; 1925 Or. Laws 468, 468-71. West Virginia enacted a similar law requiring record keeping and reporting to law enforcement. 1925 W. Va. Acts 32. The Revolver Association took its proposal to the National Conference of Commissioners on Uniform State Laws, which, based in part on California's adoption of the Revolver Association's law, took the matter under consideration. *See* 1924 Conference Report, *supra*, at 711. In the meantime, Virginia, Michigan, New Jersey, Massachusetts, and the Territory of Hawaii followed New York's approach. *See* 1926 Va. Acts 285; 1927 Mich. Pub. Acts 887; 1927 N.J. Laws 742; 1925 Haw. Sess. Laws 790; 1927 Mass. Acts 413.

The Commission on Uniform Laws adopted a firearms act in 1926. *A Uniform Act to Regulate the Sale and Possession of Firearms*, *reprinted in* Handbook of the National Conference of Commissioners on Uniform State Laws, 36th Ann. Conf., 575-79 (1926) (1926 Conference Report). This version of the act closely followed the Revolver Association's proposal, and included the licensing, waiting period, record keeping, and reporting requirements. *Id.* at 576-77. Four years later, the Commission revised the uniform act. National Conference of Commissioners on Uniform State Laws, *Uniform Firearms Act* (1930). The revised

uniform law prohibited the transfer of a handgun to anyone under the age of 18 and anyone whom the vendor had "reasonable cause to believe" had been convicted of a violent crime, was a drug addict or "habitual drunkard," or who was of "unsound mind." *Id.* at 5. The new version also increased the waiting period to 48 hours, and required the vendor to transmit the records to law enforcement within six hours. *Id.* These changes were designed to give "law enforcement time to stop the sale by telephoning the handgun dealer, if the purchaser were a prohibited person." Kopel, *supra*, at 356; Kennett & James, *supra*, at 193 (explaining that the delay was intended to allow a cooling off period and to allow the police to "to examine [an] application to determine if [the purchaser] belonged to a category of persons forbidden to make purchase: chronic alcoholics, certain types of criminals, drug addicts, minors, etc.").

In the following years, Pennsylvania, South Dakota, Washington, and Alabama adopted laws modeled on the Uniform Firearms Act of 1930. 1931 Pa. Laws 497, 491; 1935 S.D. Sess. Laws 355; 1935 Wash. Sess. Laws 599; 1936 Ala. Laws 51. Texas followed other states in requiring handgun vendors to record information about the transaction, but also required purchasers to obtain a "certificate of good character" before purchasing a handgun. 1931 Tex. Gen. Laws, 447, 447-48. Congress acted, too, adopting a law regulating sales in the District of Columbia. 47 Stat. 650 (1932).

Regulation was not limited solely to handguns. Several states extended their firearms sales requirements to ammunition. New York, for example, placed age restrictions on the sale of ammunition. 1911 New York Sess. Laws 442, 443; *see also, e.g.*, 1922 Mass. Acts 557, 563. Montana, Virginia, and Hawaii included ammunition sales in their permit-to-purchase (or similar) requirements. *See* 1918 Mont. Laws 6, 6-7; 1926 Va. Acts 285, 285; 1933 Haw. Sess. Laws 35, 37. In the 1960s, Massachusetts and Illinois followed suit. 1967 Ill. Laws 2600, 2602; 1968 Mass. Acts 623, 624; *see also* Multistate Amici Curiae Br. 10-14 (providing examples of state laws regulating ammunition sales), ECF No. 19. And in the Federal Firearms Act of 1938, Congress made it a crime to ship firearms or ammunition to any person whom the shipper knew or had "reasonable cause to believe" was convicted for or charged with a violent crime. 52 Stats. 1250, 1251 (1938).

B. Background Checks Are Longstanding in America

As the foregoing history shows, law enforcement has played a role in the sale of firearms and ammunition to prevent prohibited people from getting a gun or bullets since at least the 1910s. Several states enacted permit-to-purchase requirements, which involved a form of pre-authorization by law enforcement. For example, in 1918, Montana required a person to get a permit from the local sheriff before purchasing a firearm or ammunition. 1918 Mont. Laws 6, 6-7. Other states,

like California, involved law enforcement at the time of purchase by requiring vendors to notify law enforcement of the transaction. 1917 Cal. Stat. 221, 222-23. Indeed, it was the desire to give law enforcement more time to intercede that prompted the Commission on Uniform Laws to include the 48-hour waiting period in the 1930 version of its proposed model law. *See* Kopel, *supra*, at 356; *see also* Kennett & James, *supra*, at 193, 210.

California's ammunition background check serves the exact same purpose in the exact same manner. The primary difference between background checks in many early 20th century laws involving law enforcement and modern background checks, such as California's ammunition background check, is that modern laws require law-enforcement approval as prerequisite to the sale. But this difference does not change the process for purchasing a weapon as a practical matter. The ammunition background check law requests essentially the same information from the purchaser—name, address, date of birth—for transmission to law enforcement. *Compare* Cal. Penal Code § 30352, *with* 1917 Cal. Stat. 221, 222-24. And law enforcement uses that information to prevent prohibited people from obtaining and using guns and ammunition. What required a 24- or 48-hour wait in the 1910s now, in the vast majority of Standard Checks, takes a few minutes. *See* ER 956. The average Standard Check takes about the same time as the process did in the 1910s. *See* ER 251-52.

Moreover, the move to background checks as a prerequisite to a sale is possible because of the late 20th century information technology revolution. Reliable internet, computer databases, and other technologies promise a procedure that is more accurate, more efficient, and faster than the procedure in place in the early 20th century. *See* Cal. Penal Code § 30370; Cal. Code Regs., tit. 11, §§ 4302-03; *see also* ER 395, 948-49. The computerized background check process stands in the same relation to the early 20th century use of law enforcement as the use of airplanes to surveil property does in relation to an officer observing a property from the street. *Cf. Heller II*, 670 F.3d at 1276 (Kavanaugh, J., dissenting) (citing *Ciraolo*, 476 U.S. at 213). In both scenarios, technology has enabled law enforcement to more thoroughly consider information that has always been available to it. The advent of computer databases with information on prohibited persons allows California to be more comprehensive than it has been in the past—checking not just firearms transactions, but also ammunition transactions. But the State is acting within its historically accepted parameters when doing so.

C. Laws Necessitating In-Person Purchasing Are Longstanding

California Penal Code section 30312's requirement that ammunition purchases and transfers take place in face-to-face transactions also has antecedents in the laws of the early 20th century. Virtually all the laws anticipated that the person purchasing the firearm would be present in the store. Again, California's

1917 law provides a good example. The act included a copy of the form that had to be filled out by the vendor and the purchaser. 1917 Cal. Stat. 221, 222-24. Among other things, it required both the vendor and the purchaser to sign the record, something that would be impracticable if the transaction were done by mail or telegram. *See id.* at 224; *see also, e.g.*, 1918 Mont. Laws 6, 6 (extraordinary session).

Another way of viewing this is that the Second Amendment right to purchase firearms does not extend to remote purchasing. As the Supreme Court recognized in *Heller*, the Second Amendment does not enshrine the right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. By extension, it does not protect the right to purchase a firearm or ammunition wherever and in whatever way the purchaser wants. History helps provide the contours of the right. For example, in *Teixeira*, this Court held "no historical authority suggests that the Second Amendment protects an individual's right to *sell* a firearm unconnected to the rights of citizens to 'keep and bear' arms." *Teixeira*, 873 F.3d at 686-87. And when the Court upheld California's 10-day waiting period in *Silvester*, it rejected a right to take immediate possession of a firearm, reasoning: "Before the age of superstores and superhighways, most folks could not expect to take possession of a firearm immediately upon deciding to purchase one. As a purely practical matter, delivery took time. Our 18th and

19th century forebears knew nothing about electronic transmissions." *Silvester*, 843 F.3d at 826. Similarly, the early 20th century laws show that the Second Amendment does not create a right to purchase firearms and ammunition remotely.

D. Recordkeeping Laws Are Longstanding

It is not clear whether the district court's order preliminarily enjoining the background check provisions applies to the recordkeeping requirements in California Penal Code section 30352(a)-(b). *See* ER 120. But the first amended complaint challenges the Ammunition Laws' recordkeeping requirement. ER 1743. And Plaintiffs' motion for preliminary injunction sought to have those provisions enjoined. ER 1636. In any event, the historical record discussed above shows that keeping records of firearm transactions has a long history and falls outside the scope of the Second Amendment. Section 30352's recordkeeping requirement for ammunition is a direct descendant of those laws; indeed, it requires recording essentially the same information as California's 1917 handgun recordkeeping requirement. *See* 1917 Cal. Stat. 221, 222 (requiring vendors to "keep a register" listing the time and date of the sale, information about the firearm, and information about the purchaser).

E. Laws Requiring Identification Are Longstanding

Like the recordkeeping requirement, it is not clear whether the district court's preliminary injunction applies to the ID requirement. *See* ER 102. A purchaser

needs an ID not just for the background check process, but also for the recordkeeping requirement. *See* Cal. Penal Code § 30352(a) (requiring ID number for recordkeeping); *id.* § 30370(b) (requiring ID number for background check). The history of background checks shows that establishing the purchaser's identification is a common and longstanding requirement. For instance, Delaware's 1911 law required that handgun purchasers must be "positively identified" before purchase. 1911 Del. Laws 28, 29. The whole point of the various laws' recordkeeping requirements was to identify the purchaser (to prevent prohibited people from purchasing firearms). *See, e.g.*, 1917 Cal. Stat. 221, 222.

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: October 14, 2020

Respectfully submitted,

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

/s/ Nelson Richards
NELSON R. RICHARDS
PETER H. CHANG
Deputy Attorneys General
Attorneys for Defendant-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S SEPTEMBER 23, 2020 ORDER

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 and the United States of America the foregoing is true and correct and that this declaration was executed on October 14, 2020, at Sacramento, California.

Eileen A. Ennis	*s/ Eileen A. Ennis*
Declarant	Signature

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