Case No. 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
(18-cv-00802-BEN-JLB)

APPELLEES' SUPPLEMENTAL BRIEF

C. D. Michel
Sean A. Brady
Anna M. Barvir
Matthew D. Cubeiro
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
sbrady@michellawyers.com

Paul D. Clement
Erin Murphy
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue,
N.W. Washington, D.C. 20004
(202) 389-5036
erin.murphy@kirkland.com

Counsel for Plaintiffs-Appellees

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INTRODUCTION

This Court has asked for supplemental briefing addressing whether "there exists 'persuasive historical evidence establishing that'" California's ammunition background check scheme "'imposes prohibitions that fall outside the historical scope of the Second Amendment.'" Dkt. 64 (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (2014)). The answer to that question is straightforward: No. California's imposition of a background check on the acquisition of ammunition is, by the State's own admission, the first *ever* of its kind. Indeed, only one state has ever even attempted to embrace such a regime, and it promptly abandoned the idea after it proved completely unworkable for all the reasons that have marred California's ill-conceived efforts to implement it. And *Jackson* itself squarely rejected the argument that ammunition regulations are *categorically* outside the scope of the Second Amendment—and rightly so, for that proposition finds zero historical support.

The State has thus been forced to resort to strained analogies to try to insulate its error-ridden regime from Second Amendment scrutiny, insisting that it is "in effect" a prohibition on possession of firearms by felons, or that it must be immune from scrutiny because it imposes only a "condition" on the acquisition of ammunition. Those claims rest on implausible readings of *Heller* that would insulate virtually *every* firearm or ammunition regulation from Second Amendment scrutiny. And the State's reliance on background checks on the acquisition of *firearms* is doubly flawed, for *no* court has held that firearm background checks are categorically immune

from Second Amendment scrutiny, let alone that they would bring a novel and redundant regime requiring a separate background check for the acquisition of ammunition along with them if they were. To the contrary, given the preference in constitutional law for less restrictive alternatives and the skepticism for piling prophylaxis on prophylaxis, the existence of far more common background checks for firearm purchases only adds to California's constitutional woes, rather than perversely exempting its novel law from constitutional scrutiny altogether.

Of course, none of that is to say that an ammunition background check regime is necessarily *un*constitutional. It just means that such a regime must be scrutinized by the same standards as any other burden on Second Amendment rights. And for all the reasons set forth in detail in Appellees' Brief, the district court plainly did not abuse its discretion in concluding that the State cannot meet its burdens under those standards and on this record. A regime that refuses law-abiding citizens access to the ammunition that is essential to their exercise of Second Amendment rights more than 15% of the time for reasons as trivial as an address change and without explaining to them why, and that has precluded countless more law-abiding Californians from even *trying* to lawfully purchase ammunition because their state-issued identification is not good enough to get them in the door, is hardly a sufficiently tailored means of accomplishing the State's legitimate ends.

I. THERE IS NO HISTORICAL EVIDENCE THAT EITHER AMMUNITION BACKGROUND CHECKS IN PARTICULAR OR AMMUNITION LAWS IN GENERAL FALL OUTSIDE THE SCOPE OF THE SECOND AMENDMENT.

At the outset, there can be no serious dispute that the district court correctly found historical evidence of ammunition background check regimes entirely absent, for California's ammunition background check regime is, by the State's own admission, the first *ever* of its kind. Throughout both the legislative and the ballot initiative that produced the regime, its lead proponent openly touted it as a "historic" measure that would make California "the first state in America" to impose background checks on the acquisition of ammunition.[1] And correctly so, for in the nearly 230 years since the Second Amendment was ratified, only one other state has even tried to impose a comparable regime, and that legislation (a twenty-first century novelty enacted in 2013) never went into effect—in large part because, unlike California, New York realized *before* subjecting law-abiding citizens to that unprecedented requirement that there was no feasible way to implement it without

[1] Gavin Newsom (@GavinNewsom), Twitter (Aug. 6, 2019, 3:33 PM), https://twitter.com/GavinNewsom/status/1158823537802563584; *Cox, Newsom Face Off in Final California Gubernatorial Debate*, KQED (Oct. 8, 2018), https://www.kqed.org/forum/2010101867627/cox-newsom-face-off-in-final-california-gubernatorial-debate (statement of Gov. Gavin Newsom at 00:29:22); *see also, e.g.*, Press Release, Office of Governor Gavin Newsom, *Ahead of Implementation Date of New Gun Safety Policies in California, Governor Newsom and State Leaders Reaffirm Commitment to Ending Epidemic of Gun Violence*(Jun. 25, 2019), https://www.gov.ca.gov/2019/06/25/ahead-of-implementation-date-of-new-gun-safety-policies-in-california-governor-newsom-and-state-leaders-reaffirm-commitment-to-ending-epidemic-of-gun-violence; McClatchy, *Gavin Newsom Discusses Prop. 63 (Gun Regulation) with the Bee Editorial Board*, San Luis Obispo Trib. (Feb. 6, 2018), https://www.sanluisobispo.com/news/politics-government/election/article103944156.html.

imposing extreme burdens on the ability to lawfully acquire ammunition. *See* James B. Jacobs & Zoe A. Fuhr, *Universal Background Checking—New York's SAFE Act*, 79 ALB. L. REV. 1327, 1349-52 (2016). It should come as little surprise, then, that California has never denied its regime's novelty throughout this litigation, but rather has defended the regime as an exercise of its avowed power to "'try novel legislative experiments.'" A.O.B. 42 (quoting *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018)).

The complete lack of historical precedent for California's ammunition background check is particularly striking because there is nothing novel about ammunition or ammunition sales. This is not a situation in which the novelty of a law is a product of some recent technological development, such that judges are forced to divine what James Madison would have thought about video games or cell phones. Ammunition and ammunition sales are older than the Republic and pre-date the Second Amendment. The complete absence of any historical practice of requiring individuals to undergo background checks before they can purchase the ammunition without which their firearms are useless thus speaks volumes.

Even broadening the lens to include the handful of states that require an individual to show a firearms card to obtain ammunition, *see* Br. of Illinois, et al. 11-12, only underscores the novelty of California's approach (and the availability of less restrictive alternatives). These firearm-ID-check regimes exist in only four states today and are of recent vintage; the oldest one was not enacted until the second half of the twentieth century. *See* 2013 Conn. Acts 3 (Reg. Sess.) (codified at Conn. Gen. Stat. §

29-38m); 1967 Ill. Laws 2600 (current version codified at 430 Ill. Comp. Stat. 65/2(a)); 1968 Mass. Acts 737 (codified at Mass. Gen. Laws ch. 140, § 129C); 2007 N.J. Laws ch. 318 (codified at N.J. Stat. Ann. § 2C:58-3.3).[2] Moreover, those laws do not require a vendor to run a background check at the point of sale, but rather simply require the individual to present a valid firearms card. That a handful of states have adopted a less restrictive alternative only underscores the novelty of California's alone-in-the-nation approach. Simply put, there is no history, period—let alone any "longstanding" history, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)—of requiring an individual to submit to a background check every time she wants to acquire ammunition.

Nor is there any historical evidence to support the notion that restrictions on the acquisition of ammunition are somehow categorically immune from Second Amendment scrutiny. In fact, this Court has already squarely rejected that argument after finding nothing in "case law or other 'historical evidence in the record before [it]' indicating that restrictions on ammunition fall outside of the historical scope of the Second Amendment." *Jackson*, 746 F.3d at 968 (quoting *United States v. Chovan*, 735 F.3d

[2] Only one state, Montana, and one territory (at the time), Hawaii, imposed similar restrictions before these, in 1918 and 1933 respectively, and both were repealed some time ago. *See* 1918 Mont. Laws 6, 6-7; 1933 Haw. Sess. Laws 37-38. Virginia had what appears to have been a unique law requiring proof of payment of a tax on firearm possession before one could acquire ammunition; that revenue-raising measure is likewise no longer on the books. *See* 1926 Va. Acts 285, 285.

1127, 1137 (9th Cir. 2013)).[3] It could hardly be otherwise, as "*Heller* does not include ammunition regulations in the list of 'presumptively lawful' regulations," *id.*, and there is no historical (or even modern-day) evidence that imposing restrictions on the acquisition of ammunition by law-abiding citizens has ever been a prevalent (or even at all common) practice.

While ammunition has been around since the dawn of the firearm, no restrictions on its acquisition at the time of the founding have been unearthed. To the contrary, the principal early laws mentioning ammunition were laws *requiring* able-bodied men to acquire it, for without it, the firearms required for militia service would be useless. *See, e.g.*, 1785 Del. Laws § 7, p. 59 (requiring "every person between the ages of eighteen and fifty" to "at his own expence, provide himself … with a musket or firelock" and "a cartouch box to contain twenty three cartridges"); 1 Stat. 271 (1792) (requiring "every free able-bodied white male citizen" between the ages of 18 and 45 to "provide himself with a good musket or firelock" and at least "twenty four cartridges" or "a good rifle" and "twenty balls"). Beyond that, the only founding-era laws touching on ammunition were the "fire-safety" measures the Court discussed in *Heller*, which imposed restrictions on how gunpowder could be stored, not restrictions

[3] *Jackson* also squarely held that the Second Amendment protects the right "to obtain the bullets necessary to use" firearms, 746 F.3d at 967. This Court recently reiterated that proposition, *see Duncan v. Becerra*, 970 F.3d 1133, 1146 (9th Cir. 2020), and the State does not appear to dispute it.

on acquiring gunpowder or ammunition in the first place. 554 U.S. at 632; *see also id.* at 684-85 (Breyer, J., dissenting).

That did not change in the next century. Indeed, the few nineteenth century restrictions on acquiring ammunition were blatantly discriminatory measures designed to deprive Black Americans of fundamental rights.[4] For example, "Virginia passed a law in 1806 that required every 'free negro or mulatto' to first obtain a license before carrying or keeping 'any fire-lock of any kind, any military weapon, or any powder or lead.'" Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 516 (2004) (quoting Act of Feb. 4, 1806, 1805-1806 Va. Acts ch. XCIV, at 51). And ammunition restrictions were part of the "systematic efforts" by "the States of the old Confederacy" to disarm Black Americans in the wake of the Civil War. *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010) (plurality op.) (citing, *e.g.*, 1865 Miss. Laws p. 165, § 1 ("no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition")). Far from reflecting the historical scope of the Second Amendment, discriminatory measures such as these reinforce the

[4] Likewise, the rare pre-founding laws that restricted access to ammunition were borne of religious bigotry. *See, e.g.*, An Act for Disarming Papists, 7 Va. Stat. at Large 35-39 (1756) ("no papist ... may have, or keep in his house ... any arms, weapons, gunpowder or ammunition"); *see also* Francis X. Curran, *Catholics in Colonial Law* 106 (1963).

absurdity of exempting ammunition restrictions from the scrutiny demanded of firearm restrictions and were a core impetus behind the Fourteenth Amendment, *see id.* at 772-73, as reflected in Frederick Douglass' declaration that "[a] man's rights rest in 3 boxes. The ballot box, jury box and the cartridge box." Frederick Douglass, *The Life and Times of Frederick Douglass* 275 (Dover Publ'ns 2003). The fact that the few historical antecedents for restricting the ability of law-abiding individuals to acquire ammunition were part and parcel of efforts at discriminatory *disarmament* is hardly a promising basis for exempting them from meaningful Second Amendment scrutiny. Doing so would be akin to professing fealty to the Fifteenth Amendment while expressing indifference to literacy tests and poll taxes.

Even in the twentieth century, restrictions on the acquisition of ammunition by law-abiding citizens remained rare. As noted, even today only four states require an individual to show a firearms card to obtain ammunition (but do not require an *additional* background check at the point of sale), and none of those laws is longstanding. *See* Br. of Illinois, et al. 11-12. And while the federal government briefly had a record-keeping requirement for ammunition sales between 1968 and 1986, in the 85 years since it first began comprehensively regulating firearms through the National Firearms Act of 1934, "Congress has neither adopted nor proposed any primary gun control strategy based on the regulation of ammunition," Scott D. Dailard, *The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills*, 20 J. Legis. 19 (1994), and "F[ederal] F[irearms] L[icensee]s have

never been required under federal law to conduct a background check for purchasers of ammunition." Vivian S. Chu, Cong. Rsch. Serv., R42687, *Internet Firearm and Ammunition Sales* 3 (2012). That smattering of twentieth century regulations that are not even analogous to California's novel regime cannot support any effort to exempt all regulations of ammunition from any Second Amendment scrutiny at all.

In short, there is a reason San Francisco could not "point[] to historical prohibitions discussed in case law or other 'historical evidence …' indicating that restrictions on ammunition fall outside of the historical scope of the Second Amendment" in *Jackson*, 746 F.3d at 968, and the State could not point to any here. No such evidence exists. The district court thus plainly did not abuse its discretion or commit any clear error in finding that "an ammunition background check has no historical pedigree," ER54, that might take it "outside the historical scope of the Second Amendment,'" Dkt. 64.

II. AMMUNITION BACKGROUND CHECKS DO NOT FALL INTO ANY OF THE CATEGORIES THAT *HELLER* DESCRIBED AS "PRESUMPTIVELY LAWFUL."

Unable to claim any longstanding historical tradition of imposing background checks (or even other kinds of restrictions) on the acquisition of ammunition by law-abiding citizens, California and its amici attempt to analogize the State's novel regime to other types of measures that *Heller* described as "presumptively lawful." 554 U.S. at 626-27 & n.26. But even assuming "presumptively lawful" equates to "fall[ing] outside the historical scope of the Second Amendment," *Jackson*. 746 F.3d at 968—an

assumption that is difficult to reconcile with *Heller*[5]—those strained analogies are unavailing.

A. Ammunition Background Checks Are Not "Prohibitions on the Possession of Firearms by Felons and the Mentally Ill."

The State first claims that background checks are "presumptively lawful" because they are, "in effect," "prohibitions on the possession of firearms by felons and the mentally ill," *Heller*, 554 U.S. at 626-27 & n.26. *See, e.g.*, A.O.B. 34-36; A.R.B. 11. That claim is nonsensical.[6] The laws plaintiffs are challenging do not purport to criminalize possession of firearms or ammunition by persons lacking Second Amendment rights, like felons. California's possession prohibitions for such persons (which have analogs in other states and federal law) are found in separate (and extensive) sections of the California Penal Code. *See* Cal. Penal Code §§ 29800-30. The laws at issue here (which have no such analogs and are entirely novel) do

[5] It is hard to see why *Heller* would have described such measures as "*presumptively* lawful" if it in fact meant to declare them immune from Second Amendment scrutiny. The far more sensible reading of *Heller* is that it described such measures as "presumptively lawful" because they either typically burden individuals who lack Second Amendment rights (*e.g.*, "felons and the mentally ill") or typically impose burdens consistent with the exercise of Second Amendment rights. But if analysis of a particular restriction (or a particular application of a restriction) reveals that it imposes a severe burden with no historical pedigree, then nothing in *Heller* compels courts to uphold it nonetheless. To the extent *Jackson* suggests otherwise, *see* 746 F.3d at 960, plaintiffs reserve the right to challenge it.

[6] The State accuses plaintiffs of "offer[ing] no response to this argument" in their principal brief. A.R.B. 11. In fact, plaintiffs responded explicitly to the State's attempt to analogize its law to "prohibitions on possession of protected arms by felons," and they made exactly the same argument there that they reiterate here: Ammunition background checks and possession prohibitions are manifestly not the same thing. *See* A.B. 21. Virtually every state has the latter; no state but California has the former.

something quite different: They require all ammunition acquisitions to be processed through a California-licensed (and based) vendor, and require that vendor to run a background check before selling or otherwise transferring ammunition to the would-be acquirer. *See id.* § 30370; A.B. 3-6. The very fact that possession prohibitions are commonplace, while gatekeeping ammunition-background checks on all persons are a complete novelty, should suffice to defeat California's effort to equate those two distinct schemes for purposes of constitutional analysis.

To be sure, one of the *objectives* the State claims its regime is intended to further is to help keep firearms and ammunition out of the hands of people who are prohibited from possessing them. But *Heller* did not describe all laws designed to *further the objective* of keeping firearms out of the hands of felons and the mentally ill as "presumptively lawful." It described "*prohibitions on* the *possession* of firearms by felons and the mentally ill" as "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26 (emphasis added). Had the Court meant to declare every law intended to effectuate the goal of keeping firearms out of the hands of prohibited persons "presumptively lawful" (or, even less plausibly, categorically immune from Second Amendment scrutiny), then *Heller* itself presumably would have come out differently, for that was one of the justifications the District of Columbia offered in support of its handgun ban. *See id.* at 698 (Breyer, J., dissenting). Indeed, the vast majority of restrictions on acquiring or possessing a firearm or ammunition are designed at least in part to help keep them out of the hands of people who are disqualified from

exercising Second Amendment rights; for the government does not have a legitimate interest in trying to prevent *law-abiding* citizens from acquiring or possessing either firearms or the ammunition necessary to make them effective. The State's theory thus would make *Heller* entirely contradictory and take virtually *every* restriction on the acquisition or possession of arms or ammunition outside the scope of the Second Amendment.

This is a case in point. The law the State is here to defend requires a background check every time someone wants to acquire ammunition. That law is connected to enforcing California's prohibitions on unlawful possession of a *firearm* (if at all) in only the most attenuated way. Presumably the theory is that subjecting all would-be purchasers to a background check regime that rejects law-abiding citizens upwards of 15% of the time (without even helping them understand why) enables the State, upon learning that a prohibited person sought to purchase ammunition from a licensed vendor (which to date has happened in, at most, a measly 0.12% of attempted transactions), to, after rejecting the transaction, track down the would-be purchaser and investigate whether he is in possession of a firearm of which the State was not already aware through its extensive reporting requirements, and if so prosecute him for violating the State's separate criminal prohibitions on unlawful possession of a firearm. Far from eliminating the need to scrutinize the State's chosen means for compatibility with the Second Amendment, that kind of "'prophylaxis-

upon-prophylaxis approach' requires [courts to] be particularly diligent in scrutinizing the law's fit." *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (plurality op.).

In short, just as a voter identification law is not categorically immune from constitutional scrutiny just because one of its aims is to prevent felons or others not qualified to exercise the franchise from voting, neither is an ammunition background check law categorically immune from constitutional scrutiny just because one of its aims is to prevent felons and others not qualified to exercise Second Amendment rights from acquiring firearms. To hold otherwise would eliminate from means-end scrutiny any scrutiny of the means.

B. Ammunition Background Checks Are Not "Presumptively Lawful 'Conditions and Qualifications on the Sale of Arms.'"

The State next claims that its background check regime imposes "presumptively lawful 'conditions and qualifications on the sale of arms.'" A.R.B. 12 (purporting to quote *Heller*, 554 U.S. at 627 n.26); *see also* A.O.B. 36. But that argument rests on the credulity-straining claim that *Heller* declared anything that can be described as a "condition" or "qualification" on obtaining a firearm "presumptively lawful" (or, even worse, wholly immune from Second Amendment scrutiny). While the State understandably purports to disclaim that argument, it proceeds to embrace it in the very next breath, insisting that its regime is "presumptively lawful" simply because it makes a background check a "'condition precedent' to purchase … ammunition." A.R.B. 12-13. The State's argument thus reveals itself to be just another

variation on the same argument this Court rejected in *Jackson*—i.e., that the entire category of "restrictions on ammunition fall[s] outside of the historical scope of the Second Amendment." 746 F.3d at 968. Indeed, the State tellingly does not identify any "condition" or "qualification" on obtaining arms or ammunition that it does *not* think would be "presumptively lawful."

In reality, the only sensible reading of *Heller* is that "conditions and qualifications on the commercial sale of arms" are "presumptively lawful" only if there is a "longstanding" tradition of comparable laws. 554 U.S. at 626-27 & n.26; *see, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) ("[c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment"). Any other reading of *Heller* would produce absurd results. If conditions and qualifications were categorically "outside the historical scope of the Second Amendment," *Jackson*, 746 F.3d at 968, then a State could "condition" sales of firearms on payment of a $500,000 tax, or impose a "qualification" of 10,000 hours of firearms training, or five years of police or military service, and the Second Amendment would have nothing to say about it. Any claim that the same Court that recognized an individual and fundamental right to keep and bear arms meant to simultaneously eviscerate that right through a nine-word clause and a footnote is indefensible—which likely explains why the State refuses to defend it. *See* A.R.B. 12.

Under a correct understanding of the "conditions and qualifications on the commercial sale of arms" language, California's novel regime falls outside that

category twice over. First, as discussed, neither restrictions on the acquisition of ammunition by law-abiding citizens generally nor ammunition background checks in particular are "longstanding" (or even prevalent today). *See supra* Part I. Second, California's regime is not confined to the "commercial" sale of ammunition (a word that the State conveniently omits from its quotation from *Heller*, *see* A.R.B. 12). It applies equally to *non*-commercial "acquisitions"—e.g., an individual who wants to bring leftover ammunition acquired during an out-of-state hunting trip back home with him, ship a box of ammunition to his brother living on the other side of the state as a Christmas gift, or transport ammunition from an out-of-state home to his California residence. *See* Cal. Penal Code §§ 30312,(b), 30314(a). Accordingly, even assuming the kinds of "conditions and qualifications on the commercial sale of arms" that *Heller* had in mind were entirely "outside of the historical scope of the Second Amendment," *Jackson*, 746 F.3d at 968, California's ammunition background check regime is not one of them.

C. Firearms Background Checks Are Neither Categorically Outside the Scope of the Second Amendment Nor Analogous to the State's Novel Ammunition Regulation Regime.

California and its amici are thus left trying to analogize the State's novel *ammunition* background check regime to background checks on acquiring a *firearm*. But that argument fails (at least) twice over as well, for those laws are neither "outside of the historical scope of the Second Amendment," *Jackson*, 746 F.3d at 967, nor in any event analogous to the State's concededly novel ammunition regime.

First and foremost, that argument rests on the faulty premise that *firearm* background checks are immune from Second Amendment scrutiny. Neither this Court nor any other has embraced that radical proposition—and with good reason, for it too would lead to absurd results. If background check regimes were categorically outside the scope of the Second Amendment, then a state could take ten years or charge $1 million to process them, or license only one background check processing location for the entire state, and the Second Amendment would have nothing to say about it. Moreover, while *firearm* background check regimes as least have a longer pedigree than *ammunition* background check regimes (which is not saying much since the latter have no pedigree at all), they too do not qualify as "longstanding," as the State's own amici have detailed how states did not begin to enact them until the 1920s. *See* Everytown Br. 11-16; *Duncan*, 970 F.3d at 1150 ("in our circuit, we have looked for evidence showing whether the challenged law traces its lineage to founding-era or Reconstruction-era regulations"). Accordingly, as a matter of both history and common sense, firearm background check laws are not immune from Second Amendment scrutiny.

Of course, that does not mean that firearm background checks are necessarily incompatible with the Second Amendment. It just means that they are constitutional only if they are sufficiently tailored to avoid "'unnecessary abridgment' of constitutionally protected conduct." *McCutcheon*, 572 U.S. at 199; *see also Duncan*, 970 F.3d at 1167. Consistent with that understanding, courts confronted with challenges to

background check or waiting period laws have not rejected those challenges out of hand, but rather have subjected them to the same scrutiny as other burdens on the exercise of Second Amendment rights. *See, e.g.*, *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1255 (D.C. Cir. 2011); *Heller v. District of Columbia* (*Heller III*), 801 F.3d 264, 276-77 (D.C. Cir. 2015); *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016); *Turaani v. Sessions*, 316 F. Supp. 3d 998, 1010-11 (E.D. Mich. 2018); *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1074-76 (D. Colo. 2014), *vacated on other grounds*, 823 F. 3d 537 (10th Cir. 2016).

At any rate, even assuming firearm background checks were sufficiently "longstanding" to be "presumptively lawful," that would not help the State because this case is not about a firearm background check regime. It is about California's alone-in-the-nation *ammunition* background check regime. The fact that many states (including California) impose the former but only California imposes the latter demonstrates both the incoherence of treating them as one and the same for purposes of the "presumptively lawful" test and the problem California faces in trying to justify this right-threatening "prophylaxis-upon-prophylaxis approach." *McCutcheon*, 572 U.S. at 221. Only California attempts to preclude individuals from taking possession of the ammunition necessary to make effective the firearms that they *already* went through a background check to obtain without first processing that ammunition through a California-licensed (and based) vendor who must run a background check for each and every acquisition. Every other state in the nation is

content to rest (at most) on a prohibition of the possession of firearms by certain individuals backed by a system of background checks for firearm purchases. Thus, California's bald declaration that "[a]mmunition 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,'" A.R.B. 10, rests on a notion of obviousness that has escaped the notice of every other jurisdiction in the nation.

That alone is powerful evidence that ammunition background checks are not "outside the historical scope of the Second Amendment," *Jackson*, 746 F.3d at 968, for "[e]ven if modern laws alone could satisfy *Heller*'s history- and tradition-based test, there presumably would have to be a strong showing that such laws are common in the states" today, *Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting). Yet even though felons have been prohibited from possessing firearms for nearly a century, *see United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), it was not until 2013 that *any* state arrived at the purportedly "obvious" conclusion that imposing background checks on every acquisition of *ammunition* might help enforce those prohibitions—and that state quickly thought better of it once the idea proved infeasible for all the same reasons that have plagued California's subsequent effort. *See* Jacobs & Fuhr, *supra*, at 1349-52. Accordingly, for the better part of a century, every state save California has contented itself with the far more "obvious" means of simply enforcing its possession prohibitions directly and regulating the sale of *firearms*.

California's amici's efforts to analogize to other types of firearms or ammunition laws stray even further afield. For example, unable to point to comparable laws on their own books, the states that support California's effort point to the handful of state laws that require an individual to show a firearms card to obtain ammunition. *See, e.g.*, Br. of Illinois, et al. 11-12. But setting aside the problem that those laws are neither common nor longstanding, *see supra* p. 6-11, that argument reveals everything wrong with trying to deem laws outside the scope of the Second Amendment simply because they fall within some loose-fitting conception of "conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. After all, the existence of an obvious less restrictive alternative (that itself may or may not be constitutional) is generally a strike against the government when it comes to constitutionally (or even statutorily) protected activity. *See, e.g.*, *McCullen v. Coakley*, 574 U.S. 464, 490-92 (2014); *Hobby Lobby v. Burwell*, 573 U.S. 682, 728-29 (2014). Treating the use of a less restrictive alternative by a handful of states as a justification to entirely exempt California's different and more burdensome "condition" from meaningful constitutional analysis gets matters backwards. Moreover, as a practical matter, there is an obvious difference between a law that requires a driver to *supply* a driver's license to purchase gasoline and a law that requires a driver to *reapply* for a driver's license every time she needs to fill up. Any rule that compelled courts to ignore such manifestly different burdens where fundamental rights are concerned would make a hash of means-end scrutiny.

The State's analogies to records-keeping requirements on those licensed to sell ammunition are even more strained, *see* ER 79-85; Everytown Br. 17-22, which perhaps explains why the State did not bother to reprise them in either its Opening Brief or its Reply Brief. The State's new regime does not merely require vendors to keep a record of their ammunition sales. It makes it unlawful for a vendor to sell (or otherwise transfer) ammunition to anyone who does not supply an approved form of identification and then pass the State's (highly unreliable) background check. *See* Cal. Penal Code §§ 30312, 30370. Whatever the limits on requiring vendors to keep records that do not preclude sales, a law that prevents the people protected by the Second Amendment from purchasing the basic prerequisites necessary to exercise their constitutional rights stands on different footing. To call such a law "a natural extension of th[e] recordkeeping requirement" for firearms sales, Everytown Br. 17, is like calling a rule barring students from school buildings unless they present a form of identification other than the standard one the school issues and then pass an erratic background check to boot "a natural extension" of the requirement that the school take attendance. Accordingly, even assuming recordkeeping requirements were categorically "outside the historical scope of the Second Amendment," *Jackson*, 746 F.3d at 968, they would not bring the State's novel ammunition background check regime along with them.

In the end, the strained efforts of the State and its amici to analogize California's novel ammunition background check regime to far more commonplace

restrictions imposed by numerous other jurisdictions (and California) serve only to underscore why the search for historical pedigrees and analogous conditions has to focus on the specific policy at issue, rather than on generalities. If most jurisdictions have long imposed the same restriction, then a constitutional analysis that focuses on text, history, and tradition appropriately accounts for that specific tradition. But if states have only recently regulated a subject and then almost all adopted less restrictive alternatives, then there is no basis for exempting an entirely novel restriction from Second Amendment scrutiny. A contrary view would ignore the law's preference for less restrictive alternatives and its skepticism of prophylaxis-upon-prophylaxis approaches, and would plainly involve an evasion, not an application, of *Heller*.

* * *

In sum, the district court was eminently correct—and certainly did not abuse its discretion—in finding that "an ammunition background check has no historical pedigree," ER54, for even today, California's regime is the first and only one of its kind. That alone suffices to defeat any claim that "there exists 'persuasive historical evidence establishing that'" it "'imposes prohibitions that fall outside the historical scope of the Second Amendment.'" Dkt. 64 (quoting *Jackson*, 746 F.3d at 968). But even broadening the lens beyond ammunition background check regimes, there is no historical evidence that California's regime is of a piece with any other kind of law that might fall outside the historical scope of the Second Amendment. To the extent

any of the laws to which the State analogizes even fit that mold, its analogies are patently flawed.

Of course, none of that is to say that an ammunition background check regime is necessarily *un*constitutional. It is just to say that an ammunition background check regime must be subject to meaningful Second Amendment scrutiny, which under this Court's precedent asks whether the State can carry its burden of proving that its chosen means further a sufficiently important state interest in a sufficiently tailored way. For all the reasons explained in Appellees' Brief, *see* A.B. 7-11, the district court plainly did not abuse its discretion in concluding that the State has not proven that it is likely to satisfy that burden. After all, the State's own evidence revealed that its novel system has rejected nearly 16% of transactions by individuals known to be law-abiding—most of whom (tens of thousands) never went on to acquire ammunition—in service of flagging a mere 0.12% of transactions in which the purchaser appeared to be a prohibited person. And even those figures are generous to the State, as the State not only has had a nearly 3% error rate even within that 0.12%, but has made purchasing ammunition so difficult that its own evidence confirmed that untold numbers of law-abiding individuals were thwarted at the threshold for lack of requisite identification because the State does not recognize its own standard-issue identification for (and only for) ammunition purchases. On top of all that, the State provides *non*-prohibited persons with no guidance on how to navigate its convoluted regime, leaving people to fend for themselves in trying to figure out how to secure

government approval to exercise a fundamental constitutional right. While those facts certainly explain the State's palpable desire to immunize its regime from Second Amendment scrutiny, the simple reality is that nothing in *Heller*, the historical record, or common sense provides any basis for accepting the remarkable view that the Second Amendment has nothing to say about laws that burden a law-abiding citizen's ability to acquire the ammunition necessary to exercise the very right the Second Amendment protects.

CONCLUSION

For the foregoing reasons, this Court should reject the notion that California's novel ammunition regime is outside the historical scope of the Second Amendment and affirm the district court's order.

Date: October 14, 2020

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady

KIRKLAND & ELLIS LLP

s/ Paul D. Clement
Paul D. Clement

Counsel for Plaintiffs-Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Counsel for Plaintiffs-Appellees