

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
NOVEMBER 16, 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

TABLE OF CONTENTS

	Page
Introduction.....	4
Background.....	4
A. The Basic Ammunition Eligibility Check	4
B. Implementation of the Basic Check During the Ammunition Laws’ First Seven Months	8
Argument	9
I. The Basic Check Is a Constitutionally Permissible Regulation of Ammunition	9
A. The Basic Check Is a Presumptively Lawful Regulatory Measure	9
B. The Basic Check Advances California’s Interest in Public Safety and Is Appropriately Tailored to That Purpose	13
C. Plaintiffs’ Challenges to the Basic Check Fail	21
Conclusion	28

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bauer v. Becerra</i> 858 F.3d 1216 (9th Cir. 2017)	<i>passim</i>
<i>City of Los Angeles v. Alameda Books, Inc.</i> 535 U.S. 425 (2002).....	18
<i>City of Renton v. Playtime Theatres, Inc.</i> 475 U.S. 41 (1986).....	18
<i>Colo. Outfitters Ass’n v. Hickenlooper</i> 24 F. Supp. 3d 1050 (D. Colo. 2014)	12
<i>District of Columbia v. Heller</i> 554 U.S. 570 (2008).....	11, 15
<i>Heller v. District of Columbia</i> 670 F.3d 1244 (D.C. Cir. 2011).....	11, 12, 25
<i>Heller v. District of Columbia</i> 801 F.3d 264 (D.C. Cir. 2015).....	12
<i>Jackson v. City & County of San Francisco</i> 746 F.3d 953 (9th Cir. 2014)	<i>passim</i>
<i>Kwong v. Bloomberg</i> 723 F.3d 160 (2d Cir. 2013)	27
<i>McCutcheon v. FEC</i> 572 U.S. 185 (2014).....	23
<i>McDonald v. Chicago</i> 561 U.S. 742 (2010).....	11
<i>Pena v. Lindley</i> 898 F.3d 969 (9th Cir. 2018)	25

TABLE OF AUTHORITIES (continued)

	Page
<i>Silvester v. Harris</i>	
843 F.3d 816 (9th Cir. 2016)	<i>passim</i>
<i>United States v. Carter</i>	
750 F.3d 462 (4th Cir. 2014)	18
<i>United States v. Chovan</i>	
735 F.3d 1127 (9th Cir. 2013)	10, 14, 15
<i>United States v. Mai</i>	
952 F.3d 1106 (9th Cir. 2020)	16, 18

STATUTES

California Penal Code

§ 26815	6
§ 27540(f)	8
§ 27540(g).....	8
§ 28220	6
§ 28220(b).....	6
§ 30000	24
§ 30005	24
§ 30352(b).....	13
§ 30352(e)(3)	27
§ 30370	6, 8, 11
§ 30370(a).....	9
§ 30370(b).....	20
§ 30370(c)	6, 21, 28

OTHER AUTHORITIES

1923 Cal. Stat. 695.....	11
2016 Cal. Stat., ch. 55, § 19.....	15, 16, 24

TABLE OF AUTHORITIES
(continued)

	Page
California Code of Regulations, Title 11	
§ 4301(c)	7
§ 4302	6, 27
§ 4303	<i>passim</i>
§ 4303(b)	21
§ 4303(b)-(c)	6
§ 4303(d)	7
§ 4303(d)(1)	8
§ 4303(d)(2)	8
§ 4305	6, 27
James B. Jacobs & Zoe A. Fuhr, <i>Universal Background</i> <i>Checking—New York’s Safe Act</i> , 79 Albany L. Rev. 1327, 1350 (2016)	13

INTRODUCTION

By order dated November 16, 2020, the Court directed the parties to “file supplemental briefs addressing the constitutionality of the Basic Check in its own right.” Order, ECF No. 75. The Basic Check requires an ammunition purchaser to present a valid ID, pay a \$19 fee, and wait, typically about a day, for the California Department of Justice (the Department) to determine the purchaser’s eligibility to possess ammunition. In its own right, the Basic Check is constitutional under this Court’s decisions in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016) and *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017). The Basic Check is, in all ways that matter, the same as the firearms background check. As with firearms background checks, a short wait and modest fee to help protect public safety by keeping weapons out of the hands of dangerous, prohibited people is consistent with the right to keep and bear arms protected by the Second Amendment.

BACKGROUND

A. The Basic Ammunition Eligibility Check

Under California’s Ammunition Laws enacted in 2016 by Proposition 63, the Basic Check is the default procedure that any eligible person can use to purchase ammunition. ER 394.¹ The Basic Check authorizes a single ammunition purchase,

¹ As in the Opening Brief, the Attorney General uses the term “Ammunition Laws” to refer to the ammunition-related provision enacted by Proposition 63 (as amended). *See* Appellant’s Opening Br. (AOB) 6 n.1, ECF No. 14.

and must be used each time a purchaser wants to buy ammunition. Cal. Pen. Code § 30370(c); Cal. Code Regs., tit. 11, § 4303.² The purchaser must pay a \$19 fee and present the vendor with an ID card so the purchaser's identifying information can be submitted to the Department online through the Dealer Record of Sale Entry System (DES). Cal. Code Regs., tit. 11, § 4303(b)-(c); ER 394-97; *see generally* ER 823-72 (DES vendor user guide). In most respects, the "Basic Ammunition Eligibility Check is essentially the same background check as a firearms eligibility check." ER 883-84. There are two noteworthy differences between the procedures. First, firearms background checks rely, in part, on the federal National Instant Criminal Background Check System (NICS), whereas Basic Checks do not. *See* ER 137; Cal. Penal Code § 28220(b). The Basic Check relies exclusively on state records. ER 137; *see also* ER 395. Second, purchasers who submit a Basic Check may take immediate possession of the ammunition once they pass the check, whereas firearms purchasers must wait 10 days from the time of purchase to take possession of a firearm regardless of how fast the background check clears. *Compare* Cal. Penal Code § 30370, *with id.* §§ 26815, 28220.

² All purchasers who own a firearm may elect to use the optional, streamlined Standard Check. Cal. Penal Code § 30370; Cal. Code Regs., tit. 11, § 4302. Earlier briefing in this case and the record outline that procedure. AOB 17-15; Appellant's Reply Br. (RB) 13-20, ECF No. 58; ER 240, 397-98, 948-50.

After submitting a Basic Check to DES, the vendor provides the purchaser with a reference number, known as an Ammunition Transaction Number or DROS number. Cal. Code Regs., tit. 11, §§ 4301(c), 4303(d).³ The purchaser can enter the number into the Department’s California Firearms Application Reporting System website to receive the results of the check. *Id.* § 4303(d); ER 1293. Once the purchaser’s information has been submitted to DES, the system checks the ID against Department of Motor Vehicle (DMV) records to confirm the ID is valid. ER 395. An invalid ID will result in a rejection. ER 801, 859. If the ID is valid, the system compares the ID against four state databases to determine whether the purchaser is a prohibited person: (1) the Automated Criminal History Record System; (2) the Mental Health Firearms Prohibited System; (3) the California Restraining and Protective Order System; and (4) the Wanted Persons System. ER 395. DES automatically approves transactions that result in no hits in those databases; a Department analyst is not involved. ER 395. If, however, the purchaser’s information yields a hit, a Department analyst must manually review the record to determine whether the purchaser is prohibited from possessing

³ See also ER 1062 (“The Department has determined that providing an ATN to the prospective purchaser . . . is the most effective method of communicating the status of the Basic Ammunition Eligibility Check[.]”); ER 1289 (“The ATN is a tracking mechanism for a specific transaction. It is also known as the DROS number.”); ER 1243 (directing vendors to “provide the DROS number to the [purchaser] and advise them to check the status of their eligibility check on the Department’s California Firearms Application Reporting System”).

ammunition. ER 395; *see also* ER 1113 (explaining that there is no reasonable alternative to a manual review of the record). Manual reviews can take a few minutes to a few days, or longer in a fraction of checks where the records warrant investigation. ER 395.

Purchasers who pass the background check may buy as much ammunition as they want. *See* Cal. Penal Code § 30370; Cal. Code Regs., tit. 11, § 4303; ER 754 (“There is no limit to the amount of ammunition that can be delivered using one eligibility check.”).⁴ Once cleared, they have 30 days to complete their purchase. Cal. Code Regs., tit. 11, § 4303(d)(1). Purchasers who are rejected receive a notice, and they may take steps to address the reasons for the rejection. ER 152-53, 859. For example, a person who is rejected because her ID is expired, can get a new ID from the DMV, and submit a new Basic Check. Those who receive a Basic Check denial because the Department’s records show that they are prohibited will receive a letter from the Department providing the reason for the denial. Cal. Code Regs., tit. 11, § 4303(d)(2); ER 136 (same); ER 142 (example denial letter). An administrative process allows those who disagree with the Department’s

⁴ Handgun purchasers are limited to one handgun every 30 days. Cal. Penal Code § 27540(f). Starting July 1, 2021, that limitation will also apply to semiautomatic centerfire rifles. *Id.* § 27540(g).

determination to challenge it. ER 136-38 (describing the processes); ER 152 (form used to challenge Department records).

B. Implementation of the Basic Check During the Ammunition Laws' First Seven Months

The Basic Check, like the other ammunition background checks at issue in this appeal, took effect on July 1, 2020. Cal. Penal Code § 30370(a). Over the Ammunition Laws' first seven months, the Department processed 19,599 Basic Checks. ER 238, 251. Of those, 95.3% (18,685) were approved, 2.9% (572) were denied because the purchaser was prohibited, 0.5% (107) were rejected because the purchaser's ID did not match a DMV record, and 1.2% (235) were rejected because the purchaser's criminal history was incomplete. ER 251. About a quarter of the checks were processed automatically, and about three-quarters required manual processing by a Department analyst. ER 253. The typical check took about a day to complete. *See* ER 252.⁵ Departmental data shows that the Basic Checks that took longer were more likely to result in the purchaser being denied as

⁵ A small number of transactions each month require a substantial amount of processing time. ER 252 n.5. For example, by the end of January 2020, the Department was still processing 19 Basic Checks submitted in December 2019—about 1% of that month's submissions. ER 251 n.3. Longer transactions usually occur because a Department analyst must track down records maintained by other governmental entities, such as the records following an arrest. ER 239, 395. Because this “small number of transactions significantly increases the average [mean]” processing time, the median processing time, relied on above, better reflects the experience of the typical purchaser. *See* ER 252 & n.5.

prohibited. *See* ER 296 (reporting that 134 Basic Checks submitted in October 2019 had not been processed by November 1, 2019); ER 251 & n.2 (reporting that all Basic Checks submitted in October 2019 had been processed by January 31, 2020, and noting that 16 of the Basic Checks processed after November 1, 2020, had been denied because the purchaser was prohibited—meaning 16 out of 134, or 11.9%, were denied because the purchaser was prohibited).

ARGUMENT

This Court applies two-step inquiry to laws regulating the sale of ammunition. *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). 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.” *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). The Basic Check is constitutional under both steps of the analysis.

I. THE BASIC CHECK IS A CONSTITUTIONALLY PERMISSIBLE REGULATION OF AMMUNITION

A. The Basic Check Is a Presumptively Lawful Regulatory Measure

The parties have submitted briefs to the Court addressing whether the Ammunition Laws are presumptively lawful regulations. Appellant’s Suppl. Br., ECF No. 65; Appellees’ Suppl. Br., ECF No. 67. Arguments presented in that brief about the Ammunition Laws generally apply to the Basic Check specifically. Appellant’s Suppl. Br. 15-22. The Attorney General will not repeat all those

arguments here. Nevertheless, it bears reiterating that the Basic Check is directly analogous to firearms background check laws that have been on the books for over a century. California’s 1923 firearms law provides a good example. 1923 Cal. Stat. 695. That law required firearms vendors to keep records of handgun sales, transmit those records to law enforcement, and wait a day to deliver the firearm to the purchaser. *Id.* at 699-701. The Basic Check functions in essentially the same way, with the main difference being that it requires law enforcement authorization before the transfer. *See* Cal. Penal Code § 30370; Cal. Code Regs., tit. 11, § 4303. A few points raised in Plaintiffs’ supplemental brief warrant a response, as they address whether the Basic Check is a presumptively lawful regulation.⁶

According to Plaintiffs, viewing firearms background checks that have gone unchallenged for over 100 years as presumptively lawful regulations is a “radical

⁶ Plaintiffs recognize that, in this Circuit, “‘presumptively lawful’ equates to ‘fall[ing] outside the historical scope of the Second Amendment.’” Appellees’ Suppl. Br. 9 (quoting *Jackson*, 746 F.3d at 968). They contend, however, that the “far more sensible reading of *Heller*” is that the presumption can be overcome. *Id.* at 10 n.5. That misreads *Heller* by giving no meaning to the Court’s “assurances” that its decision would “not cast doubt on” the listed regulations. *McDonald v. Chicago*, 561 U.S. 742, 786 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). Plaintiffs’ view would cast doubt on most of the regulations the Court listed. For example, Plaintiffs argue that laws enacted in the early 20th century are not “longstanding” under *Heller*. Appellees’ Suppl. Br. 16. Yet if that were the case, then the validity almost all laws imposing conditions and qualifications on the commercial sale of arms would be in doubt, since virtually all of those laws were enacted in the early 1900s. *See* Appellant’s Suppl. Br. 10-11 & n.3.

proposition.” Appellees’ Suppl. Br. 14. No one, to the Attorney General’s knowledge, has ever filed a lawsuit contending that background checks performed at the time of sale violate the Second Amendment. Plaintiffs do not cite any case holding that background checks must be analyzed under step two of the *Heller* analysis. *See* Appellees’ Suppl. Br. 17.⁷ They instead worry that if the Second Amendment does not cover firearm background checks, then “a state could take ten years or charge \$1 million to process them, or license only one background check processing location in the entire state.” Appellees’ Suppl. Br. 17. Equating that caricature to a small fee and a reasonable wait to purchase a firearm is reductionism at odds with how courts analyze the first step. *See, e.g., Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) (“[T]he proper interpretive approach is to reason by analogy from history and tradition.”). Moreover, Plaintiffs’ extreme

⁷ Two of the cases Plaintiffs cite assume, without deciding, that the laws being challenged implicated the Second Amendment. *See Silvester*, 843 F.3d at 826-27 (“We assume, without deciding, that the regulation is within the scope of the Amendment and is not the type of regulation that must be considered presumptively valid.”); *Colo. Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1074 (D. Colo. 2014) (assuming, without deciding, that statute requiring background checks before a firearm could be loaned to another person implicated the Second Amendment, but noting that “the Court has grave doubt that a law regulating (as opposed to prohibiting) temporary private transfers of firearms implicates the Second Amendment’s guarantee at all”), *vacated on other grounds*, 823 F.3d 537 (10th Cir. 2016). The other two opinions did not address challenges to background checks as a condition of the sale or transfer of firearms. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253-56 (D.C. Cir. 2011); *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 275-80 (D.C. Cir. 2015).

hypothetical serves only to underscore the reasonableness of the requirements they challenge. *See Bauer*, 858 F.3d at 1222 (recognizing that while “a hypothetical \$1 million fee could effectively eliminate the general public’s ability to acquire a firearm, that extreme comparison underscores the minimal nature of the burden” imposed by the challenged law).

Plaintiffs also assert that “[t]his is not a situation in which the novelty of a law is a product of some recent technological development.” Appellees’ Suppl. Br. 4. That is incorrect. California’s background check laws depend on technologies that became reliable for widespread and high-volume use only during the last 20 or so years. The Basic Check, for example, relies on vendors having a computer, and internet access, to submit information to DES, and on DES to automatically check four other databases. *See, e.g.,* Cal. Penal Code § 30352(b) (requiring vendors to “electronically submit” information to the Department); ER 914 (informing vendors that internet access, a computer, and a magnetic stripe card reader are “necessary” to process background checks). It was the “‘lack of adequate technology’” and that prevented New York from implementing its ammunition background check law. James B. Jacobs & Zoe A. Fuhr, *Universal Background Checking—New York’s Safe Act*, 79 Albany L. Rev. 1327, 1350 (2016) (quoting John Flanagan & James Malatras, *Memorandum of Understanding Regarding the Statewide License and Record Database Utilization for Eligibility to*

Purchase Ammunition (July 10, 2015).) Plaintiffs’ “notion of obviousness,” which assumes that because something has not been tried it “has escaped notice,” is thus inapplicable here. Appellees’ Suppl. Br. 18. Technological and logistical developments can make obvious *and* achievable a policy that was previously obvious, yet impossible or impracticable. *See* ER 1693 (“We know background checks work. . . . Yet California law only requires background checks for people who purchase firearms, not for people who purchase ammunition. We should close that loophole.”). California happens to be the first state to employ these new technologies—and commit considerable knowledge and resources—to implement point-of-sale ammunition background checks. That does not make the laws any less of an obvious idea or sound policy. Nor does it mean that the laws are not of a piece with the history and tradition of firearms regulations in this country.

B. The Basic Check Advances California’s Interest in Public Safety and Is Appropriately Tailored to That Purpose

Assuming, for the sake of argument, that the Basic Check implicates the Second Amendment, intermediate scrutiny would apply because the procedure regulates only the “*manner* in which persons may exercise their Second Amendment rights.” *See Chovan*, 735 F.3d at 1138. Unless they are prohibited, Californians may still buy as much ammunition as they like, of whatever legal caliber they like, as often as they like. And, once they are approved, they may use the ammunition for whatever lawful purpose they like, including “in defense of

self, family, and property.” *See Heller*, 554 U.S. at 628. The Basic Check is, in this sense, indistinguishable from the 10-day waiting period challenged in *Silvester*. *See* 843 F.3d at 828 (“The regulation does not prevent, restrict, or place any conditions on how guns are stored or used after a purchaser takes possession.”). The Court applied intermediate scrutiny there, noting that the law placed less of a burden than the firearms storage ordinance in *Jackson* and the prohibition on perpetrators of domestic violence possessing firearms in *Chovan*, both of which the Court reviewed under intermediate scrutiny. *Id.* (citing *Jackson*, 746 F.3d at 963; *Chovan*, 735 F.3d at 1139). For the same reasons, intermediate scrutiny would apply to the Basic Check.

Under intermediate scrutiny, a law will be upheld so long as “(1) the government’s stated objective [is] significant, substantial, or important; and (2) [there is] reasonable fit between the challenged regulation and the asserted objective.” *Chovan*, 735 F.3d at 1139. The Basic Check satisfies the first prong because it advances California’s compelling interest in protecting public safety by preventing violent felons, the dangerously mentally ill, and other prohibited people from having easy access to ammunition. AOB 38 (citing ER 1693; 2016 Cal. Stat., ch. 55, § 19). Plaintiffs appear to concede that this interest satisfies the intermediate scrutiny standard. Appellees’ Answering Br. (AB) 22-23, ECF No. 33; ER 1622.

The test for a reasonable fit under the second prong “is not a strict one.” *Silvester*, 843 F.3d at 827. “[I]ntermediate scrutiny does not require the least restrictive means of furthering a given end.’ Instead, it requires only that the law be ‘substantially related to the important government interest of reducing firearm-related deaths and injuries.’” *Id.* (quoting *Jackson*, 746 F.3d at 966, 969) (internal citation omitted). “[T]he statute simply needs to promote a substantial government interest that would be achieved less effectively absent the regulation.” *United States v. Mai*, 952 F.3d 1106, 1116 (9th Cir. 2020) (quotation marks omitted).

Before Proposition 63 went into effect, violent prohibited people could, and did, buy ammunition online and from retail stores with impunity. *See* ER 1693; 2016 Cal. Stat., ch. 55, § 19. Evidence predating Proposition 63’s enactment established that prohibited people regularly purchased ammunition from stores. ER 612, 624; *see also* ER 647 (“[P]urchases of ammunition by convicted felons are widespread.”). Ammunition background checks have stopped this from happening—over 750 times in the seven months after the laws took effect. ER 237, 248-49, 251, 255.⁸ The laws may have had an even larger deterrence effect.

⁸ Plaintiffs call this number “measly.” Appellees’ Suppl. Br. 12. But stopping 750 prohibited people from buying ammunition is significant—especially where the burden on the vast majority of purchasers, including the named Plaintiffs, is minimal. At oral argument, Plaintiffs questioned the 750 number. Oral Argument at 25:02-25:12, *Rhode v. Becerra*, No. 20-55437 (9th Cir. Nov. 9, 2020)

Evidence in the record predating Proposition 63 shows that between 2.6% and 3.2% of ammunition purchasers in two California jurisdictions were prohibited person. ER 612, 624.⁹ By Plaintiffs’ own count, since the background check laws took effect, “0.12% of attempted transactions” in California have involved prohibited people. Appellees’ Suppl. Br. 12. A drop in prohibited purchasers from 2.6% or 3.2% to 0.12% is consequential on any scale, but of huge importance when the number of transactions is in the hundreds of thousands. *See* ER 251, 255 (reporting over 635,000 ammunition background checks between July 2019 and January 2020). This evidence of a post-implementation drop in prohibited

(“It’s not even 750, because they’re not including the fact that they got it wrong—about 15 of these individuals were wrong. So it’s actually 744 individuals total.”). The record does not support that math. *See* ER 249 (“[W]ith over three quarters of the 770 denials from July 1, 2019, through January 31, 2020 reviewed, 16 of the purchasers who were denied as prohibited persons have since been determined to be eligible.”); ER 251 n.4 (noting that “[t]ransactions that were initially denied, but later approved, are treated as approved” in table reporting Basic Check numbers); *see also* ER 404 (reporting that nine of the eventual 16 occurred in July and August of 2019—the first two month that the Ammunition Laws were in effect).

⁹ This evidence could support an inference that the percent of ammunition purchasers who are prohibited is actually higher. The data comes from municipalities that already had ID and recordkeeping requirements for ammunition sales—a form of deterrence in their own right—that some prohibited people probably evaded by, for example, buying ammunition online. *See* ER 613 (requiring purchaser’s “name, age, sex, date of birth, address, thumbprint, and a driver’s license/state issued identification number”); ER 620 (listing ordinance’s requirements, including the vendor recording the purchaser’s name, address, date of birth, and ID number and obtaining a signature and thumbprint).

purchasers “fairly supports” the inference that the deterrence effect is strong. *Jackson*, 746 F.3d at 969 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality)); *id.* at 965 (recognizing that the government can rely on evidence “reasonably believed to be relevant to the problem” the government is addressing (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986))).¹⁰ It also confirms the commonsense conclusion that background checks deter criminals from purchasing firearms and ammunition. *Cf. Silvester*, 843 F.3d at 828 (relying on commonsense conclusions about human behavior). Ammunition background checks thus directly stop hundreds prohibited people from buying ammunition *and*, as can reasonably be inferred, deter many others from even trying.

Without the laws, the goal of reducing gun violence by keeping ammunition out of the hands of prohibited people would be less effectively achieved. *See Mai*, 952 F.3d at 1116. These results would follow from a process that costs \$19 and typically takes a day or two (under the assumption in the Court’s order limiting the analysis to the Basic Check). *See* Cal. Code Regs., tit. 11, § 4303; ER 252. That

¹⁰ *See also, e.g., United States v. Carter*, 750 F.3d 462, 469 (4th Cir. 2014) (holding that “correlational evidence” can satisfy the intermediate scrutiny fit requirement).

process easily satisfies the intermediate scrutiny standard under *Silvester*, *Jackson*, and *Bauer*.

Silvester controls here. That case upheld California's 10-day waiting period to purchase a firearm, and specifically the wait after the purchaser had passed the background check through the tenth day. *Silvester*, 843 F.3d 818-19. As the Court recognized, there is "nothing new in having to wait for the delivery of a weapon. Before the age of superstores and superhighways, most folks could not expect to take possession of a firearm immediately upon deciding to purchase one." *Id.* at 827. The Court credited studies cited by the State that "a cooling-off period may prevent or reduce impulsive acts of gun violence or self harm" as well as the "common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down." *Id.* at 828. The Basic Check imposes less of a wait and has a more direct connection to its goal: purchasers must wait, on average, a day so prohibited people are, indisputably, stopped from buying ammunition. ER 251, 255. If people can be required to wait 10 days to purchase a firearm without violating the Second Amendment, then requiring people to wait a couple of days to buy ammunition does not violate the Second Amendment either. *See Jackson*, 746 F.3d at 967 ("[T]he right to possess

firearms for protection implies a corresponding right to obtain the bullets necessary to use them[.]” (quotation marks omitted)).¹¹

In *Silvester*, the Court also recognized that a 10-day wait to purchase a firearm did “not approach the impact of the regulation in *Jackson* that required firearms to be stored in locked containers or disabled with a trigger lock.” *Silvester*, 843 F.3d at 827 (citing *Jackson*, 746 F.3d at 963). The same reasoning applies to the Basic Check, which requires a wait, but does not affect use after the purchaser takes possession. Moreover, in *Jackson*, the government drew a “reasonable inference that mandating that guns be kept locked when not being carried will increase public safety and reduce firearm casualties.” *Jackson*, 746 F.3d at 966. As in the comparison to *Silvester*, no inferences are necessary to conclude the Basic Check achieves its goal of keeping ammunition out of the

¹¹ This is, of course, partially hypothetical, because the Basic Check is one of three checks. The Standard Check provides firearms owners the ability to buy ammunition through a process that costs \$1 and takes a matter of minutes. *See* AOB 14 (citing ER 956). Anyone who has a firearm and an up-to-date record in the State’s Automated Firearms System can use this procedure. RB 17 (citing Cal. Penal Code § 30370(b)). And those who either own a firearm but do not have a record in the system, or who have a record that is not up-to-date, can take easy steps to create a record and use the streamlined procedure going forward. *See, e.g.*, RB 17-18 (citing ER 948-49, 314-16, 310-11). The third check, known as a Certificate of Eligibility Check, also allows for a streamlined check that costs \$1 and takes a matter of minutes for those who successfully apply and pay the \$71 fee, and \$22 annual renewal fee. AOB 15 n.5. So even if there were some concern about the constitutionality of the Basic Check procedure—and under *Silvester* there is none—that concern would evaporate in the face of the Standard Check and Certificate of Eligibility Check.

hands of prohibited people. Hard evidence establishes the connection. ER 251, 255. Common sense and reasonable inferences about the deterrence effect of ammunition background checks, drawn from record evidence, further cement the conclusion that the Ammunition Laws' fit is reasonable.

The Basic Check also entails a fee, which was not at issue in *Silvester* or *Jackson*. Regulation currently sets the fee at \$19. Cal. Code Regs., tit. 11, § 4303(b). In *Bauer*, this Court upheld a \$5 portion of the \$19 fee on firearms transfers because the fee was used to help disarm prohibited people who obtained firearms using the transfer process. 858 F.3d at 1224 (“[T]he unlawful firearm possession targeted by APPS is the direct result of certain individuals’ prior acquisition of a firearm through a DROS-governed transaction.”). The \$19 fee for Basic Checks is valid for the same reason; it covers the cost of performing the background check, which directly advances California’s goal of keeping ammunition out of the hands of prohibited people. *See* Cal. Penal Code § 30370(c) (“The department shall recover the cost of processing and regulatory and enforcement activities related to this section by charging the ammunition transaction or purchase applicant a fee[.]”); ER 1460 (“The Department has determined that it must set the fee for the Basic Ammunition Eligibility Check at \$19 per transaction in order to recover the Department’s reasonable costs.”).

For these reasons, the Basic Check, standing alone, is permissible regulation of the right to keep and bear arms under the Second Amendment. As a result, the remainder of the Ammunition Laws are also constitutionally permissible.

C. Plaintiffs’ Challenges to the Basic Check Fail

Over the course of this case, the Attorney General has repeatedly insisted that the Basic Check is the default procedure and that the Basic Check is constitutional under *Silvester*, *Jackson*, and *Bauer*. *See, e.g.*, ER 482-83 (arguing that “the cases that are most directly on point are *Silvester* and *Jackson*,” and that a challenge to ammunition background checks would need to address those cases “at least if you’re talking about alleged delays or burdens”); AOB 29 (“[T]his Court could uphold the Ammunition Laws solely by considering the Basic Check procedure that anyone can use[.]” (citing *Silvester*, 843 F.3d at 827; *Bauer*, 858 F.3d at 1222)). Over the same period of time, Plaintiffs have filed six briefs addressing the constitutionality of the Ammunition Laws.¹² None of those briefs has addressed any of those cases or argued that the Basic Check procedure itself is unconstitutional. *See, e.g.*, Oral Argument at 19:11-19:22 (**The Court:** “I don’t

¹² Those briefs are: (1) the memorandum of points and authorities in support of the preliminary injunction motion, ER 1601-33; (2) the reply in support of the motion, ER 587-97; (3) the post-hearing, supplemental brief in support of the motion, ER 333-43; (4) Plaintiffs’ opposition to the Attorney General’s emergency motion to stay the trial court’s order, ECF No. 8-1; (5) Plaintiffs’ answer brief, ECF No. 33; and (6) Plaintiffs’ first supplemental brief, ECF No. 67.

recall any *argument* in your brief addressing the Basic Check. All I remember is you talking about is the Standard Check.” **Counsel:** “We do *discuss* the Basic Check in our brief[.]” (emphasis added)). *Cf.* RB 14 (“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.”). Only when pressed at the November 9, 2020 oral argument did Plaintiffs explain why they believe the Basic Check violated the Second Amendment. Oral Argument at 19:00-27:00. Plaintiffs raise five arguments that each lacks merit.

First, Plaintiffs argue that the Basic Check is unconstitutional because ammunition background checks are improper “prophylaxis-on-prophylaxis” impeding the exercise of a constitutional right. Oral Argument at 23:44-23:50 (“An ammunition background check is a classic form of prophylaxis on prophylaxis, really, on prophylaxis[.]”); *see also* Appellees’ Suppl. Br. 12-13 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (plurality opinion); *id.* at 17 (“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[.]”). Plaintiffs contend that because it is illegal for prohibited people to possess ammunition, and because firearms background checks stop prohibited people from buying guns, ammunition

background checks impose an unnecessary “third level” of protection. Oral Argument at 23:55-24:15. But people who have passed firearms background checks can become prohibited—indeed, the Armed Prohibited Persons System exists to disarm that group of people. *See Bauer*, 858 F.3d at 1219 (citing Cal. Penal Code §§ 30000, 30005). Absent the Ammunition Laws, that system cannot stop those people from buying ammunition. More broadly, prohibited people could, and did, buy ammunition with impunity online and from gun stores before the voters enacted Proposition 63. *See* ER 1693; 2016 Cal. Stat., ch. 55, § 19; ER 612, 624, 647. Ammunition background checks have stopped that from happening. ER 237, 248-49, 251, 255. They are thus not redundant suspenders to the belt of a ban on possession or firearms background check. They are, rather, complementary, as a cyclist’s helmet is to his reflectors (or, as the firearms background check is to the ban on firearms possession).

Second, and relatedly, Plaintiffs argue that *Silvester* does not control as to the wait associated with the Basic Check because “*Silvester* was dealing with a firearms background check” and “[t]here is no history in California or anywhere else in the country, for that matter, of having a background check for ammunition, let alone of having a waiting period to obtain ammunition.” Oral Argument at 23:03-23:17. But ammunition is protected by the Second Amendment because “bullets [are] necessary to use” guns. *Jackson*, 746 F.3d at 967. In the context of

background checks, the distinction between ammunition and firearms is meaningless. A gun owner who has to undergo a background check and wait a couple of days to purchase ammunition is in the same position as a gun owner who has to undergo a background check and wait 10 days to purchase another gun. Both requirements are constitutional. *See Silvester*, 843 F.3d at 828. Plaintiffs have conspicuously not argued that the Basic Check (or any background check) has stopped them from obtaining the ammunition they need to use their firearms for self-defense or other lawful purposes. In addition, Plaintiffs’ argument, by focusing on history and practice, confuses step one of the *Heller* analysis with the reasonable fit in the intermediate scrutiny analysis. The focus of that second analysis is on whether there is a reasonable fit between the challenged regulation and the government’s purpose, not what other states are doing or have done. *See Jackson*, 746 F.3d at 965; *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018) (“As Justice Brandeis famously wrote, ‘a single courageous state may, if its citizens choose, serve as a laboratory,’ and ‘try novel legislative experiments.’” (alterations and citation omitted)).

Third, Plaintiffs seem to suggest that the Basic Check is unconstitutional because “one out of two” people who have a Standard Check rejected “do not go on to successfully do a Basic Check.” Oral Argument at 19:22-19:43. Why Plaintiffs believe that implicates the constitutionality of the Basic Check is unclear.

We know next to nothing about that group of people. The only thing we do know is that they are not parties to this lawsuit. Even the California Rifle & Pistol Association's threadbare, catchall declaration does not maintain that any of its members fall into this group. ER 1557-59. To the extent the argument is intelligible, it fails because it raises the same mingled standing and facial-relief problems that defeat Plaintiffs challenge to the Standard Check. AOB 27-33, 43-46; RB 3-10.

Fourth, Plaintiffs contend that the \$19 fee is unconstitutional. Oral Argument at 25:30-26:32. As argued above and in the Attorney General's opening brief, the \$19 fee is constitutional under the reasoning in *Bauer*. AOB 29. Plaintiffs' answering brief does not respond to that argument. *See generally* AB. At oral argument, Plaintiffs told the Court that the \$19 fee is prohibitively expensive. Oral Argument at 20:48-21:06. They argued that they "put below and the state never questioned that you can purchase a box for \$4. So you could be paying, essentially, a 500% tax." Oral Argument at 20:55-21:04.¹³ But to paraphrase *Bauer*, the

¹³ The Attorney General did not question this passing unsupported assertion below because the Plaintiffs never advanced any evidence or argument based on it. *See* ER 1626-27 (noting, without citation, that a Basic Check purchaser has to "pay \$19 just to be able to purchase a box of ammunition that may cost only \$5"); *see also* ER 1744 n.3 (mentioning "a \$4 box of ammunition"). In any event, the Attorney General did not need to question the assertion because the district judge did. ER 444 ("I don't think you can buy a box of .22's for five bucks anymore. Those days are long gone.").

Plaintiffs have “neither alleged nor argued that the \$19 [Basic Check] fee . . . has any impact on [their] actual ability to obtain and possess [ammunition].” *See* 858 F.3d at 1222. Even if someone bought ammunition every other month, the annual cost of using the Basic Check fees would be \$114, about the same as the \$340 triennial licensing fee upheld in *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013). Buying ammunition that frequently seems far from likely, however, since a person could purchase a year’s supply—or more—in a single transaction. *See* ER 754.¹⁴

Under Second Amendment intermediate scrutiny analysis, the Basic Check fee is valid because there is a reasonable fit between the use of the \$19 fee to conduct a background check and California’s objective of keeping ammunition out of the hands of prohibited people. *See Bauer*, 858 F.3d at 1224. Even if First Amendment fee jurisprudence were to apply, the Court would ask whether the fee is “designed to meet the expense incident to the administration of the act and to the

¹⁴ Or, more likely, frequent purchasers will use the Standard Check that cost \$1, or the Certificate of Eligibility Check, which also costs \$1 (but has an annual fee). *See* Cal. Code Regs., tit. 11, §§ 4302, 4305. In addition, a person need not undergo a background check to purchase ammunition from a licensed shooting range for use at the range. Cal. Penal Code § 30352(e)(3) (excluding from the background-check requirement “[a] person who purchases or receives ammunition at a target facility holding a business or other regulatory license, provided that the ammunition is at all times kept within the facility’s premises”).

maintenance of public order in the matter licensed.” *Id.* at 1225 (quotation marks omitted). The \$19 Basic Check fee satisfies that standard too. *See* Cal. Penal Code § 30370(c); ER 1460 (determining that the fee will help cover the Department’s reasonable costs); *see also* Oral Argument at 26:39-26:51 (acknowledging that Plaintiffs could cite no evidence that the fee exceeds the Department’s costs).¹⁵

Fifth, Plaintiffs might be arguing that the Basic Check rejection rate poses a constitutional problem. *See* AB 12. *But see* ER 337 (conceding that Basic Checks have “a far less significant rejection rate” than Standard Checks). Just under 2% of Basic Checks result in rejections, which fall into one of two categories. *See* ER 251. The person’s ID does not match a record in the DMV system—for example, because the ID has expired. *See* ER 251. Or the person has an incomplete criminal history. ER 251. A person who receives a DMV rejection notice can correct the issue with the DMV. ER 859. And a person whose records are incomplete can submit information to the Department to update his or her records. ER 152-53. More importantly, yet again, no Plaintiff has alleged that she or he falls into either category, and Plaintiffs thus are pursuing yet another claim that they lack standing to bring. Even if they had standing, Plaintiffs cannot prevail on a

¹⁵ Even if the \$19 fee were unconstitutional (and it is not), the fee is imposed under Cal. Code Regs., tit. 11, § 4303, which is not challenged in the First Amended Complaint. *See* ER 1744-45.

facial challenge based on less than 2% of transactions—particularly where there are ways to fix the problem.¹⁶

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: December 16, 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

¹⁶ This is no to say that, in certain circumstances not present here, a person could not make out an as-applied challenge. *See* AOB 32-33.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number 20-55437

I am the attorney or self-represented party.

This brief contains 6,365 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

☐ complies with the word limit of Cir. R. 32-1.

☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☐ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

☐ it is a joint brief submitted by separately represented parties;

☐ a party or parties are filing a single brief in response to multiple briefs; or

☐ a party or parties are filing a single brief in response to a longer joint brief.

☒ complies with the length limit designated by court order dated November 16, 2020 (ECF No. 75).

☐ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Nelson Richards

Date December 16, 2020

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

Case Name: **Rhode, Kim, et al. v. Xavier
Becerra, et al. [APPEAL 9th
Cir.]**

No. **20-55437**

I hereby certify that on December 16, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S
NOVEMBER 16, 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 December 16, 2020, at Sacramento, California.

Eileen A. Ennis

Declarant

/s/ Eileen A. Ennis

Signature