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 IN RESPONSE TO THE COURT'S NOVEMBER 16, 2020 ORDER

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INTRODUCTION

This Court requested supplemental briefing "addressing the constitutionality of the Basic Check in its own right." Dkt. 75. The Basic Check, with its $19 fee for a single-ammunition-purchase check, is plainly unconstitutional in its own right. It was never designed as anything more than a stopgap, backup means of verification, as its prohibitive costs and significant delays are wholly unacceptable burdens on acquiring the ammunition necessary to effectuate the rights enshrined in the Second Amendment. This Court would not remotely countenance a $19 fee for an ink cartridge or a 24-hour wait before allowing assembly for worship. There is no reason to countenance a different result when it comes to the Second Amendment.

Whether viewed in isolation or (as the State designed it) as a backup option for those who cannot employ the Standard Check, the Basic Check imposes serious impediments to the exercise of Second Amendment rights. There is no need to speculate about the stifling effect of the State's regime; the State's own evidence confirms that it has deterred tens of thousands of law-abiding Californians from purchasing ammunition notwithstanding the availability of the Basic Check. Those results are the predictable consequence of the outsized burden the Basic Check imposes. It is expensive—indeed, it can dwarf the cost of the ammunition. It is time-consuming—it typically takes at least a day, thus foiling individuals with an immediate need to use a lawfully acquired firearm while forcing most individuals to make a second trip back to the vendor (in the midst of a pandemic, no less) to pick up the ammunition.

And those are not one-off burdens. They are recurring hindrances imposed every time an individual attempts to purchase additional ammunition. The State's suggestion that individuals can minimize burdens by stockpiling ammunition undermines its rationale for the unprecedented requirement and underscores the absurdity of making a clearance that involves considerable time and expense good for one purchase only.

The State's unprecedented regime flunks any meaningful form of constitutional scrutiny, especially given the far less burdensome alternatives available for accomplishing the State's law-enforcement objectives. Indeed, Proposition 63 itself proposed a much less burdensome four-year identification card regime—a proposal that, whatever its constitutionality, is at least far less burdensome than the current regime. Yet the legislature inexplicably supplanted what the people actually voted for with a regime that prioritizes minimizing the State's administrative burdens over minimizing the burdens on constitutional rights.

The State's response to those problems is more of the same. It recycles its misguided argument that background check regimes are outside the scope of the Second Amendment entirely. It continues to conflate approved firearm regimes with novel ammunition regimes. But the Supreme Court has admonished that prophylactic-on-prophylactic restrictions on the exercise of constitutional rights merit more scrutiny, not less. The fact that the vast majority of individuals burdened by the regime have already cleared a background check for their lawfully possessed firearm plainly heightens the State's burden, rather than discharges it. The State insists that this Court

has already held a $19 fee on any activity protected by the Second Amendment categorically constitutional. But the case the State invokes did not even address a claim that a $19 *firearm* purchase fee is unduly burdensome, let alone address a challenge to a recurring $19 fee to purchase a box of $3 ammunition that can be freely purchased in virtually every State in the union.

In short, the State does not come close to meeting its high burden of proving that the district court abused its discretion in preliminarily enjoining a novel regime that has proven to be a significant impediment to the exercise of a fundamental constitutional right.

I. The Basic Check Significantly Impedes The Exercise Of Second Amendment Rights.

This Court has asked the parties to "address[] the constitutionality of the Basic Check in its own right," Dkt. 75, and the Basic Check is plainly unconstitutional "in its own right." That is unsurprising: The Basic Check was never intended to operate as a standalone regime. Instead, consistent with its prohibitive cost, substantial delays, and awkward one-time-only nature, it was designed to serve only as a backup or stopgap for what should have been the rare situation in which the far cheaper $1 Standard Check was not available. *See* E.R.VI 1460 (noting State's estimate that less than 1% of purchasers would use Basic Check). Isolating the Basic Check and analyzing it independent of the Standard Check, which was supposed to provide the standard, default option, only magnifies the Basic Check's constitutional flaws. Just as the Recess

Appointment power would never work as the primary means of presidential appointment, imposing a costly and burdensome check each and every time a person seeks to purchase ammunition, with no learning curve, as a front-line solution would be a constitutional non-starter. Thus, whatever the merits of the good-for-four-years ammunition card approved by the people, or even a properly functioning Standard Check *supplemented* by the Basic Check, the Basic Check standing alone flunks any meaningful form of constitutional scrutiny.

The State begins by touting that Basic Checks have a much higher approval rate (about 95%) than Standard Checks (about 84%). *See* Appellant's Second Supp. Br. ("A.2d.Supp.Br.") 9. But the State cannot make a constitutional virtue out of the constitutional vice of the Standard Check's abominable rate of false negatives. Indeed, in any properly functioning system, the approval rate for Standard Checks should be considerably *higher* since Standard Checks are available only to people who have already passed a background check to purchase a firearm. The lower approval rate for the Standard Check than the open-to-anyone Basic Check is plainly a constitutional bug, not a feature. *See* Appellees' Answering Brief ("A.B.") 23-27. The State's focus on the relative approval rates thus just reinforces the problems with the Standard Check, without enhancing the constitutionality of the Basic Check in the least.

At any rate, no amount of accuracy could fix the fundamental problem with the Basic Check: It imposes undue burdens it imposes in terms of both time and expense. That is clear from the State's own data. By design—and unsurprisingly given the

radically disparate costs of the two routes—more than 96% of individuals who attempted to purchase ammunition during the first six months of the State's novel background check regime sought to utilize the $1 Standard Check. E.R.II 251, 255. Of those 616,257 attempted Standard Check transactions, 101,047, or 16.4%, were false negatives—*i.e.*, individuals rejected for reasons having nothing to do with being prohibited from possessing ammunition. E.R.II 255. If the Basic Check were really a minimally burdensome alternative, then one would expect to see virtually all of those frustrated purchasers switch to the Basic Check. That did not happen. Instead, only 35,294 of the 81,112 distinct purchasers frustrated by those 101,047 false negatives succeeded in obtaining ammunition. E.R.II 261. Thus, well over 50% of those improperly denied their constitutional rights through a Standard Check were entirely stymied in their efforts to purchase ammunition despite the availability of the Basic Check—whether because paying a $19 fee to purchase a $3 box of ammunition was absurd or because a 24-hour wait made purchasing ammunition for an impromptu hunting trip impractical. In other words, even with the Basic Check option available, nearly 50,000 individuals who actively sought to exercise their Second Amendment right to purchase ammunition were precluded from doing so even though there is no indication that they are prohibited persons.

And even these burdens understate the problems with the Basic Check. While the State has not provided a breakdown of how those who ultimately succeeded in obtaining ammunition did so, the Basic Check was not the answer for many, as there

were only 19,753 Basic Checks during *the entirety* of that six-month period. E.R.II 251. Thus, the State's own data demonstrate that despite a universe of more than 100,000 false negatives, fewer than 20,000 people endured the cost and delay of the Basic Check. That is a staggering loss of constitutionally protected activity. And that is to say nothing of the untold number of Californians who were deterred from trying to obtain ammunition through *any* route. That, too, is borne out by the State's evidence, as the State predicted "approximately 13 million ammunition transactions" per year, but "[i]n reality, there have been far, far less." E.R.I 36.

For those who do try, moreover, the flaws in the State's dual-track regime create additional burdens. Any rational individual who has purchased a firearm through a transaction that was recorded in the Automated Firearms System ("AFS") will select the $1 Standard Check rather than the $19 Basic Check. Yet if she is one of the 16% of individuals whose Standard Check is rejected, she is not told why the State will not let her purchase ammunition. That Kafkaesque dynamic alone is a powerful deterrent to paying $19 more to immediately try your luck with a Basic Check. There is no way for an individual to know whether the problem is that the State did not update her AFS record when it processed her change of legal name or address, or the dealer from whom she purchased her firearm neglected to include the hyphen in her last name when recording the transaction in AFS, E.R.VI 1541, or the vendor from whom she purchased the ammunition selected "Huntington Beach" instead of "Huntington BCH" in the dropdown menu when entering her address, E.R.VI 1497.

Nor would that law-abiding individual know specifically why she was not deemed eligible when she goes to the State's website to look up her Ammunition Transaction Number (if she can find it, *see* A.B.8-9). All the website will tell her is that her transaction was rejected "for one of the following reasons: 1) you do not have an AFS record or 2) the information you provided to the ammunition vendor does not match the AFS record that is on file." E.R.II 310; *see id.* at 171-73. That vague and disjunctive explanation hardly provides a reassuring basis for making another trip to the store and placing a $19 bet that the results of the Basic Check will differ from the false negative produced by the Standard Check.

The State tries to minimize the burdens in terms of cost and delay, but as noted those costs have proven prohibitive for tens of thousands of Californians. And those costs must be evaluated in light of the reality that the Basic Check provides only a one-time authorization to purchase ammunition that may cost as little as $4 a box. In light of that reality, the Basic Check imposes burdens that are radically disproportionate to the regulated activity. The $19-per-ammunition-purchase tag dwarfs the cost of the underlying ammunition, as the State acknowledges (albeit begrudgingly), A.2d.Supp.Br.26 n.13. The State could not dispute that point, as countless (if not most) boxes normally cost less than $19 and several cost as little as $3-5.[1] The sheer cost of

[1] *See, e.g.*, *Remington Target 22 Long Rifle*, Target Sports USA, https://tinyurl.com/y439gx6u (last visited Jan. 15, 2021) (<$3 for a box of 50 .22LR cartridges); *Winchester Super-X 22 Long Rifle*, Target Sports USA,

the Basic Check thus is often equivalent to a 100%, 200%, or even 500% tax on the ammunition, which underscores that the Basic Check was never meant to be a primary, standalone mechanism for providing efficient checks.

And then there is the time. A Basic Check takes *on average* at least a day to complete, and sometimes as long as a month. E.R.II 253; A.2d.Supp.Br.9 n.5.[2] That is owing to how a Basic Check is conducted. Assuming an individual can supply the requisite REAL ID or other acceptable identification (which does not include California's standard issue identification, E.R.I 9), a Basic Check does not check the individual against a single database that provides the California Department of Justice ("DOJ") an actual, final determination of whether she is prohibited from exercising Second Amendment rights. It merely checks the individual against four databases that contain information *relevant* to that determination. E.R.I 27; E.R.II 395. In other

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https://tinyurl.com/yxbn5mzl (last visited Jan. 15, 2021) (same); *Aquila High Velocity Rifle Ammunition 1B222328, 22 Long Rifle*, Able's Sporting, https://tinyurl.com/y3u8wgnk (last visited Jan. 15, 2021) (same); *see also Ammunition*, Cabela's, https://tinyurl.com/y75hbr4h (last visited Jan. 15, 2021) (search results for ammunition less than $5 per box).

This Court may take judicial notice of these ammunition prices. Fed. R. Evid. 201 (courts may take judicial notice of a fact "not subject to reasonable dispute" in that it is "capable of immediate and accurate determination"); *Threshold Enters. Ltd. v. Pressed Juicery, Inc.*, 445 F. Supp. 3d 139, 146 (N.D. Cal. 2020) ("In general, websites and their contents may be judicially noticed.").

[2] While the State suggests that the average time is distorted by a few outliers, A.2d.Supp.Br.9 n.5, the State provided both the average time *and* the median time, and the *median* time was roughly a day. E.R.II 253.

words, when DOJ does a Basic Check, it is conducting a time-consuming background check from scratch.

If there are no "hits" in any of the four databases, then DOJ will approve the purchase. E.R.II 238. But that happens only about 25% of the time. E.R.II 253. Far more often, an analyst must manually track down some additional information. For instance, if the criminal history database notes only an arrest, then a DOJ analyst must confirm whether the arrest resulted in a conviction, whether that conviction was sustained on appeal, etc., which may require "track[ing] down records maintained by other governmental entities." A.2d.Supp.Br. 9 n.5. That is why Basic Checks typically take at least a day (and often much longer) to complete, meaning the typical law-abiding Californian must make two trips to the vendor, in the midst of a pandemic, to obtain ammunition. And that is with only 3% of would-be purchasers using this route; the delays would inevitably increase immensely if that number quintupled (and then some) to include everyone whose Standard Check is arbitrarily rejected.

That further underscores that the Basic Check was designed as a backstop; it is far too inefficient and time-consuming for any state to adopt as its front-line means of providing a timely and efficient background check. Moreover, even enduring these delays is no guarantee that an individual will not be wrongly denied her right to purchase ammunition. If DOJ is unable to confirm through a "manual check" that someone is *not* prohibited from possessing ammunition (say, because the arrest is so old that the analyst cannot find a record of the arrest's disposition), then it will not approve the

transaction. E.R.II 251. In other words, a tie goes to the infringement, rather than the exercise, of a constitutional right.[3]

All of that added cost and delay is already a serious impediment to the exercise of Second Amendment rights. But the State compounds those burdens by requiring Californians to go through this same full-blown process *every single time* they try to purchase ammunition through a Basic Check. E.R.III 535-36. DOJ insists on recreating the entire background check from scratch even if it ran a full check on the same person one month, one week, or even one day earlier.[4] Thus, if, during hunting season, an individual went to his neighborhood sporting goods shop on Friday to buy shotgun shells for a weekend trip, he would be lucky if he could return on Saturday to pick up his ammunition. And if he wanted to purchase ammunition again on Monday for a hunting trip the next weekend, DOJ would insist on running the full Basic Check

[3] The State downplays the hardship in seeking to remedy these "incomplete records." Appellant's Supp Br. 28. To obtain one's records to determine what the issue is (because DOJ does not explain the deficiency that is causing the concern) requires undergoing a Live Scan, which comes with a $25 fee, plus the cost of fingerprinting, which could be as much as $45 (https://oag.ca.gov/fingerprints/locations?county=San%20Diego&order=field_livescan_rolling_fee&sort=desc). 2 ER 137-38, 145-50; 7 ER 1710. It can take DOJ up to two weeks to send records after the Live Scan process is complete. *See* https://oag.ca.gov/fingerprints/security_faq. Assuming the person can determine the issue with her records, she must then make a claim to DOJ to fix it and "[a]ttach copies of any official document or court orders that would verify" her claim. 2 ER 152-53. She must locate those supporting documents on her own, costing more time and money, assuming they are even available; if not, she cannot ever pass a Basic Check.

[4] While a basic check authorization is good for 30 days, it is good for only one use during that 30-day period. *See* E.R.V 1252; E.R.VI 1285.

all over again, with the same attendant $19 fee and multi-day delay. And the same process would be required the next time he came in, and the next, and the next after that.

That is not because the State *needs* to run a full-blown background check at the moment of purchase to accomplish its law-enforcement objectives. It plainly does not, as the Standard Check illustrates. To run a Standard Check, DOJ cross-references the individual against the Armed Prohibited Persons System ("APPS") database, which is generated by constantly cross-checking its database of past firearms transactions against the same four databases used in the Basic Check. That obviates the need to engage in the laborious process of recreating the background check from scratch, every time someone returns to purchase more ammunition. Yet even though DOJ is required to keep a record of every ammunition transaction it approves in a new "Ammunition Purchase Records File" database, Cal. Pen. Code § 30352(b), it does not use that database to create a comparable, constantly updated list for people who have been approved to obtain ammunition. Indeed, the State has expressly disclaimed any authority to create such a database. *See* E.R.V 1106. But as the district court recognized, *see* E.R.I 27, the State *could* create an APPS analog for ammunition, so that it could minimize the burden on the purchaser at the point of sale. It simply *chose* to craft a system that prioritizes minimizing the burdens on the State over minimizing the burdens on the individual.

In short, it is little surprise that only 3% of ammunition purchasers select the Basic Check, or that tens of thousands of individuals whose Standard Checks were rejected for trivial reasons like address mismatches never went on to purchase ammunition through the Basic Check, or that vendors have attested to losing significant business owing to customers being deterred by the added costs, delay, and documentation burdens imposed by the State's new regime. *See, e.g.*, E.R.VI 1502, 1509, 1514, 1519, 1524, 1529, 1534, 1540. Even with the Basic Check as a backup when the Standard Check fails, the regime is so burdensome as to create significant impediments to the exercise of Second Amendment rights.

II. The Basic Check Is Not Sufficiently Tailored To Further The State's Proffered Ends.

The severe drop-off in the exercise of Second Amendment rights caused by the State's novel regime, including the Basic Check, is reason enough to conclude that the district court did not abuse its discretion in hitting the pause button until it can resolve the serious legal challenges to that regime. *See* E.R.I 36. Courts have not hesitated to enjoin laws that produce comparable or even less staggering reductions in the exercise of constitutional rights. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment) (noting that the Court struck down a law in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) that caused a 50% reduction in facilities providing abortions); *Gallagher v. New York State Bd. of Elections*, No. 20 CIV. 5504 (AT), 2020 WL 4496849, at *16 (S.D.N.Y. Aug. 3, 2020) (granting an injunction of

election law that led to 13% and 10% drop-off in ballots counted in two elections); *cf.* Cal. Elec. Code §§ 14051(b), 14052 (providing that 25% decrease in turnout triggers state-mandated changes to local election procedures). But the district court also acted well within its discretion in concluding that the State is unlikely to meet *its* burden of proving that the regime survives any meaningful form of constitutional scrutiny. E.R.I 54-96.

This Court has unequivocally held that restrictions on the acquisition of ammunition are subject to Second Amendment scrutiny. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014). And while strict scrutiny should apply, *see* A.B.19-20, even intermediate scrutiny is a "demanding test" that "has bite" and puts the burden squarely on the government. *Duncan v. Becerra*, 970 F.3d 1133, 1165 (9th Cir. 2020). As the Supreme Court recently put it, "to survive intermediate scrutiny, 'a law must be 'narrowly tailored to serve a significant governmental interest.''" *Id.* (quoting *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017)); *see also Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369 (9th Cir. 1997). In all events, whatever the precise contours of the applicable level of scrutiny, the Basic Check cannot satisfy them, for it is not remotely tailored to avoid "unnecessary abridgment of [constitutional] freedoms." *McConnell v. FEC*, 540 U.S. 93, 232 (2003).

The first problem is the State's prophylaxis-upon-prophylaxis approach. At the outset, while the State claims that "violent prohibited people could, and did, buy ammunition online and from retail stores with impunity" before its new regime took

effect, A.2d.Supp.Br.16, the State seems to misunderstand the meaning of "impunity." It was illegal for a prohibited person to buy ammunition before California instituted its background check rule, and it will remain illegal no matter how this case is resolved. *See* Cal. Pen. Code § 30305; 18 U.S.C. § 922(g). It also was and will remain illegal for anyone to sell or otherwise provide ammunition to "any person who he or she knows or using reasonable care should know is prohibited," or "knows or has cause to believe is not the actual purchaser or transferee of the ammunition." *See* Cal. Pen. Code § 30306. Thus, to the extent a significant number of violent felons were purchasing ammunition from retail stores before the new regime took effect, that is because California apparently was not rigorously enforcing the many criminal prohibitions that already exist.

Moreover, the State already has (at least) one layer of prophylaxis to help reinforce its possession prohibitions: Under both federal and state law, individuals must pass a background check to acquire a firearm. Pub. L. No. 103-159, 107 Stat. 1536 § 102 (1993); Cal. Pen. Code § 28220(b).[5] In California, that costs $31.19, Cal. Penal

[5] That is just one of many prophylactic measures designed to help keep firearms and ammunition out of the hands of prohibited persons. *See, e.g.*, *Bauer v. Becerra*, 858 F.3d 1216, 1219 (9th Cir. 2017) (upholding charging law-abiding gun-owners a fee to help fund APPS enforcement activities); Cal. Pen. Code § 29810 (requiring courts to inform individuals convicted of an offense that triggers a prohibition on firearm possession of that restriction and to assign a probation officer to confirm that the person has relinquished any firearms and that such is noted in AFS). E.R.I 38-40 (listing other California laws that ensure prohibited parties do not gain access to firearms).

Code § 28225(a); Cal. Code Regs. Tit. 11, § 4001, and entails a "cooling off" delay of at least 10 days, Cal. Pen. Code § 26815(a). The Basic Check thus subjects law-abiding Californians who have already paid fees and endured lengthy delays to obtain a firearm to another round of fees and delays before they can obtain the ammunition without which the firearm is useless—and then subjects them to déjà vu all over again every time they want to obtain more ammunition. Given the recurring need to purchase ammunition (unless one takes the State up on its suggestion to purchase it *en masse*), this recurring set of fees and delays is less justified with each successive application. It is exactly the kind of "prophylaxis-upon-prophylaxis approach" to burdening constitutional rights that "requires [courts to] be particularly diligent in scrutinizing the law's fit." *McCutcheon v. FEC*, 572 U.S. 185, 221 (2013) (plurality opinion).

Conversely, precisely because of its duplicative nature, a background check for ammunition sales does little, if anything, to advance the State's law-enforcement interests. Individuals prohibited from possessing ammunition will own a firearm only if they either illegally procured it or illegally retained it after forfeiting their Second Amendment rights. Either way, that is hardly a universe of people who are likely to voluntarily submit to an ammunition background check that will reveal to the State their illegal possession of a firearm. *See* E.R.I 93-94. That commonsense intuition is borne out by the State's data: Of the 19,753 individuals who submitted to a Basic Check during the first six months of the novel regime's existence, a mere 572—less than 3%—were denied as prohibited persons (not accounting for the nearly 3% error rate, E.R.I

30). E.R.II 251. And the percentage goes all the way down to 0.11% if Standard Checks are taken into account. E.R.II 255.

The State speculates that perhaps its law is deterring even more criminals from purchasing ammunition. A.2d.Supp.Br.18. But the State supplies zero evidence to support that dubious claim, and one of its own studies refutes it. The study recognized that an ammunition background check would likely reduce purchases *from retail stores* by prohibited persons to a miniscule level only because "prohibited purchasers seem likely to exploit alternative sources of ammunition"; hence why the study did not recommend that proposal. E.R.III 614. A regime that imposes a fee in excess of 100% of the cost of the regulated activity and forces individuals to wait days (if not longer) for the State's approval to exercise a constitutional right for which they may have an imminent need, in service of identifying the miniscule number of attempted law-breakers who are not savvy enough to procure their ammunition from the same illegal source from which they illegally procured their firearm, is not a remotely "reasonable fit" for the State's undisputedly important interests. *Duncan*, 970 F.3d at 1168.

Making matters worse, the State "could have employed various less restrictive alternatives to achieve its goals," *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011), but inexplicably chose not to do so. Indeed, the State actually had a less restrictive alternative at its disposal, for the proposal the people voted for in Proposition 63 would not have cost $19 per transaction or entailed multi-day waits every time someone wanted to purchase ammunition. What

Proposition 63 proposed was a regime that reflects the recurring need for ammunition and resembles those employed by the handful of states that use some form of ammunition eligibility check: For a one-time fee of no more than $50, individuals could submit to a background check and obtain an ammunition eligibility card that would be good for all purchases over four years, DOJ would continuously monitor the list of cardholders and revoke cards from anyone who subsequently became ineligible, and all a law-abiding individual would have to do to purchase ammunition is present the card for a quick cross-check against DOJ's continuously monitored list. E.R.VII 1688; *compare* Br. of Illinois, et al. 11-12.

Instead of maintaining what Proposition 63 proposed, the legislature scrapped that regime in favor of an unprecedented regime in which DOJ must conduct ammunition background checks but need not create a comprehensive or reliable database for doing so. *See* E.R.VI 1402, 1409, 1416; E.R.V 1106. It did so, moreover, even as the legislature promised that its amended regime would ensure "real-time review and approval of transactions at the point of sale." E.R.VII 1575-76 n.26 (quoting *SB 1235, Third Reading*, Senate Rules Committee, Office of Senate Floor Analyses at 12). The Basic Check standing alone fares particularly poorly when compared to the alternative approved by the people, because it is wholly unresponsive to the recurring need for law-abiding individuals to purchase ammunition. Imposing a fee that dwarfs the costs of the ammunition each and every time ammunition is purchased, with no learning curve to expedite a subsequent purchase by a previously approved consumer,

is the antithesis of meaningful tailoring. Indeed, the Basic Check suffers even in comparison to a properly functioning Standard Check, which would be a much cheaper and more efficient alternative. It would thus get matters backwards to excuse the glaring flaws in the Standard Check because of the availability of the Basic Check when the Basic Check "in its own right," Dkt. 75, is far more burdensome than a properly functioning Standard Check.

None of that is to say that the regime proposed in Proposition 63, or a properly functioning standard check, would necessary be constitutional. What matters is that the availability of these "obvious and less-burdensome alternatives," *United Broth. of Carpenters and Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 968 (9th Cir. 2008)—regardless of their constitutionality—reinforces that the State's chosen means lack the "fit" that even intermediate scrutiny demands. *See, e.g.*, *McCutcheon*, 572 U.S. at 221("We do not mean to opine on the validity of any particular proposal. The point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014).

III. The State's Contrary Arguments Are Unavailing.

The State cannot muster any serious argument that the record compels the conclusion that its novel regime generally or the Basic Check in particular is narrowly, closely, or even reasonably tailored to avoid burdening more constitutionally protected conduct than necessary. The State thus devotes most of its supplemental brief to trying to eliminate that burden. Its arguments are unavailing.

1. The State first spends a quarter of its brief "reiterating" its claim that all background checks are "presumptively lawful" (by which, the State makes clear, it actually means *conclusively* lawful). *See* A.2d.Supp.Br.10-14. No court has accepted that dubious proposition even as to background checks to obtain *firearms*, let alone as to the novelty of requiring a full-blown background check every time someone seeks to satisfy the recurring need to obtain the ammunition necessary to make a firearm effective. Nor could this Court, for firearm background checks did not come into existence until the 1920s, *see* Everytown Br. 11-16, and the State's ammunition background check regime is concededly the first of its kind. *See 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"). Moreover, the State's only response to the absurdities that would result from deeming background checks outside the scope of the Second Amendment entirely is to assure the Court that it need not worry about that right now because *this* regime is "reasonable." A.2d.Supp.Br.12-13. But *this* regime is both deeply flawed and profoundly unreasonable. And in all events, courts do not have the luxury of ignoring the consequences of the legal rules they are urged to embrace.

The State tries to explain away the novelty of its regime by claiming that "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." A.2d.Supp.Br.13. Setting aside the problem that the State's chosen technology has hardly proven "reliable" (a problem New York anticipated when it scrapped its plans to impose a

similar regime, A.2d.Supp.Br.13), that claim is whiplash-inducing, for the State emphasizes in practically the same breath that firearms background checks have been around for nearly 100 years. A.2d.Supp.Br.11. It cannot be that computer technology was a necessary precursor to ammunition background checks, but not for firearm background checks. Thus, what explains the nearly century-long gap is not technology, but presumably the greater intrusiveness of taxing and investigating someone anew every time he purchases ammunition, especially when background checks for firearms purchases are already in place. Whatever the explanation, the lack of any meaningful historical precedent for ammunition background checks generally and the complete novelty of California's specific regime are two strikes against its constitutionality.

2. The State next argues that its regime is "indistinguishable" from the ten-day waiting period to obtain a firearm that this Court upheld in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016). *See* A.2d.Supp.Br.15, 19-21. That is doubly wrong. First, the State mistakenly assumes that restrictions on obtaining firearms and restrictions on obtaining ammunition are one and the same. As explained, layering ammunition checks on top of firearms checks is the kind of "prophylaxis-upon-prophylaxis approach" that demands more constitutional scrutiny, not less (especially when the State had less burdensome options at the ready). *McCutcheon*, 572 U.S. at 221. Moreover, the recurring need to purchase ammunition makes imposing restrictions designed for episodic firearms purchases far more burdensome when applied to ammunition. A firearm need only be purchased once to be capable of serving as an effective self-defense tool. But

a firearm cannot serve that purpose without ammunition. And unlike a firearm, ammunition must be replaced every time it is used. Ammunition thus is to a firearm what gasoline is to a car, and no sensible state would apply the same regulatory requirements to purchases of cars and gasoline.

Indeed, statutes and courts from the sixteenth century to the present have recognized that responsible gun owners must train frequently to gain and retain proficiency. *See, e.g.*, HERBERT LEVI OSGOOD, 1 THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 502-06; *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Responsible training, when combined with the prevalence of lawful activities such as hunting and competitive shooting, means that unless ammunition is purchased in mass quantities, it must be purchased on a recurring basis. As a result, a responsible, law-abiding ammunition purchaser will not simply be asked to endure the occasional waiting period, but will have his constitutional rights burdened time and time and time again, with no end in sight (and under the Basic Check, no learning curve whatsoever). Imposing hefty fees and long delays on the acquisition of ammunition thus imposes burdens greater and different in kind from imposing comparable fees and delays on the acquisition of a firearm. This Groundhog Day effect is akin to making a recipient of government assistance be rescreened for eligibility all over again every time she tries to use her benefits at the grocery store.

Second, *Silvester* involved a defined, statutorily mandated ten-day waiting period, not a bureaucratic delay of indefinite length. *Compare* 843 F.3d at 818 *with* E.R.V 1165

(State emphasizing that the "[s]tatute does not provide a maximum time for the Department to complete" a Basic Check and declining "to institute a time limit on the eligibility check"). And that mandatory waiting period was directly tied to an asserted State interest: giving the purchaser time to "cool[] off" and reconsider the purchase. 843 F.3d at 819. The Court thus found that delay permissible not because making individuals wait up to ten days to exercise Second Amendment rights is categorically constitutional, but because ten days was a "reasonable fit" for the State's interest in a "cooling-off" period. *Id.* at 829.

Here, by contrast, there is no requirement or need for the Basic Check to take any particular amount of time. Nor has the State ever claimed that making the purchaser take two trips (in the midst of a pandemic, no less) separated by at least a day (and what sometimes proves even more than 10 days) is necessary to effectuate "cooling off" or any other state interest. To the contrary, the State touts that Basic Checks do *not* necessarily take a full day and two trips to complete. A.2d.Supp.Br.9 n.5. Unlike in *Silvester*, then, there is no plausible argument that the State has an independent interest in the delay itself. The delay is just owing to the State's unwillingness to create a more efficient eligibility check regime, even though it has at its disposal simple options like cross-referencing the already-existing Ammunition Purchase Records File with the

APPS file a la a Standard Check or Proposition 63's original Ammunition Purchase Authorization.[6]

3. The State's reliance on *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017), to defend the cost of a Basic Check is equally misplaced. The State suggests that *Bauer* held that a $19 fee on the exercise of Second Amendment rights is categorically constitutional. A.2d.Supp.Br.26. In fact, *Bauer* had no need to address the constitutionality of the fee as such, for the plaintiffs there "neither alleged nor argued that the $19" fee for obtaining a firearm "ha[d] any impact on the plaintiffs' actual ability to obtain and possess a firearm." 858 F.3d at 1222. They instead argued only that the State's use of funds collected from the fee to pay for certain law-enforcement activities violated the rule that fees imposed on the exercise of a constitutional right must be "designed to defray (and … not exceed) the administrative costs of regulating the protected activity." *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013). While the State claims that plaintiffs have not challenged the size of the fee here either, they are wrong. Plaintiffs have consistently argued that the sheer size of the Basic Check fee is part of what makes the regime as a whole unconstitutionally burdensome, *see, e.g.*, A.B. 11, 23-25, and evidence supports the claim that this added cost is part of what is deterring people from purchasing ammunition, *see supra* Part I. And to the extent the Court has asked the

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[6] Additionally, the State has admitted that it can assign unique identifying numbers to purchasers for the purpose of tracking them. *See* ER II 247-48.

parties to address the constitutionality of the Basic Check "in its own right," the outsized nature of the $19 fee—in relation to both the Standard Check fee and the cost of the underlying ammunition—comes into sharp relief.

Moreover, like *Silvester*, *Bauer* dealt with a firearms condition, not an ammunition condition, so the Court had no occasion to consider the nature of the burden that would result from imposing a $19 fee each and every time someone wants to address the recurring need to purchase ammunition that costs far less than the fee.[7] But this Court has elsewhere recognized that imposing a 100% tax on firearms can be just as effective as prohibiting them outright. *See Silvester*, 843 F.3d at 820 (describing *United States v. Miller*, 307 U.S. 174 (1939) as upholding a "prohibiti[on]"); Brian L. Frye, *The Peculiar Story of* United States v. Miller*,* 3 N.Y.U. J.L. & LIBERTY 48, 61 & n.89 (2008) (The National Firearms Act, at issue in *Miller*, was a 100% tax on the transfer of machine guns and a 666% tax on sawed-off shotguns.). Indeed, even much lower fees in relation to the cost of the regulated activity can have a strong deterrent effect—a reality that many tax schemes are designed to exploit. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567 (2012) ("federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking"); Teh-wei Hu, et al., *The Impact of California Anti-smoking Legislation on*

[7] So too with *Kwong*, which addressed a "triennial licensing fee" for firearms, not a recurring fee for ammunition purchases. A.2d.Supp.Br.27; *see Kwong*, 723 F.3d at 167.

Cigarette Sales, Consumption, and Prices, 4 TOBACCO CONTROL S34 (1995) (detailing how California tobacco tax initiative was designed to, and did, deter smoking). It is thus unsurprising that the record reveals that the $19 fee has deterred many a Californian from trying to buy ammunition through a Basic Check.

Astonishingly, the State tries to minimize that burden by suggesting that individuals can reduce their transaction fees by stockpiling ammunition. A.2d.Supp.Br.27. How that suggestion is remotely compatible with the State's asserted interest in its background check system remains a mystery. Not only would that make it easier for someone who loses their right to lawfully possess a firearm to maintain access to ammunition, but the prospect of most firearm owners sitting on a cache of ammunition, vulnerable to thievery by those who disregard the law, cannot be squared with everything else the State argues. Indeed, to the extent the inevitable result of the State's excessive fee is to spur over-purchasing of ammunition, that is just one more reason the good-for-four-years ammunition card approved by the voters is a less restrictive alternative.

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In sum, the record evidence readily substantiates the district court's conclusion that the existence of the Basic Check does not alleviate the constitutional problems with the Standard Check. And if analyzed "in its own right," the flaws with the Basic Check are only magnified. It was never intended to be a standalone, front-line system. Whatever its merits or flaws as a backup to a (hypothetical), well-functioning Standard

Check process, a $19 fee that occasions substantial delay and operates with no learning curve is a complete misfit as a standalone means to impose a check each and every time an individual seeks to address her recurring need for ammunition. Viewed in isolation, the Basic Check is a constitutional non-starter. The burdens it imposes are not theoretical, but are borne out by the State's own data. The district court did not abuse its discretion by concluding that a novel regime that, according to the State's own evidence, has deterred nearly 50,000 Californians from exercising a fundamental constitutional right merits close enough scrutiny to warrant a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Basic Check is not constitutional in its own right.

Respectfully submitted,

Dated: January 15, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of this Court's order of November 16, 2020 because this brief contains 6934 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond type.

January 15, 2021

s/Sean A. Brady
Sean A. Brady

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: January 15, 2021

MICHEL & ASSOCIATES, P.C.

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