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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
11 CIVIL DIVISION  
12

13 **KIM RHODE et al.,**

14 Plaintiffs,

15 v.  
16

17 **ROB BONTA, in his official capacity**  
**as Attorney General of the State of**  
18 **California, et al.,**

19 Defendant.  
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Case No. 3:18-cv-00802-BEN-JLB

**DEFENDANT'S BRIEF IN  
RESPONSE TO THE COURT'S  
ORDER ENTERED ON  
DECEMBER 15, 2022**

Courtroom: 5A  
Judge: Hon. Roger T. Benitez  
Action Filed: April 26, 2018

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## INTRODUCTION

California’s Ammunition Laws<sup>1</sup> guard against the purchase of ammunition by persons prohibited from doing so under state or federal law. The Ammunition Laws are constitutional under the new text-and-history standard for Second Amendment claims adopted by the Supreme Court in *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022). Under this standard, courts must determine whether “the Second Amendment’s plain text covers an individual’s conduct” regulated by the challenged law, and if it does, the burden then shifts to the government to “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* at 2126. Here, the Ammunition Laws are constitutional at both stages of the analysis.

**First**, at the textual stage, Plaintiffs cannot show that their proposed course of conduct is covered by the “plain text” of the Second Amendment. *Bruen*, 142 S. Ct. at 2126. Plaintiffs fail to carry their burden of demonstrating that the “plain text” of the Second Amendment covers their proposed course of conduct— purchasing ammunition without complying with the Ammunition Laws. *See Bruen*, 142 S. Ct. at 2126. Those laws do not prevent any law-abiding citizen from “keep[ing]” or “bear[ing]” any “Arms,” U.S. Const. amend. II, or from purchasing ammunition necessary to operate a firearm and effectively exercise that right.

**Second**, even if Plaintiffs could satisfy their initial burden under *Bruen*, the Ammunition Laws are “consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct. at 2126. In *Bruen*, the Supreme Court approved of background checks to ensure that only law-abiding individuals are permitted to

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<sup>1</sup> The Attorney General uses “Ammunition Laws” to refer to the laws that require that (1) ammunition transactions take place in a face-to-face interaction at a licensed ammunition vendor, (2) purchasers submit to a background check before the ammunition sale or transfer may be completed, (3) purchasers demonstrate proof of lawful presence in this country, and (4) ammunition vendors report certain information to the California Department of Justice. These provisions were enacted by Proposition 63, as amended by Senate Bill 1235. 2016 Cal. Stat., ch. 55.

1 carry firearms in public. *Bruen*, 142 S. Ct. at 2138 n.9. Nothing in the opinion  
 2 questions the constitutionality of background checks to ensure that only law-  
 3 abiding citizens are able to purchase and possess firearms and ammunition. The  
 4 Ammunition Laws merely extend the application of background checks to the  
 5 purchase of ammunition, ensuring that individuals prohibited under state and  
 6 federal law from possessing firearms and ammunition are not able to acquire  
 7 ammunition. This requirement is consistent with the recognized tradition of  
 8 preventing dangerous or unvirtuous individuals from keeping or bearing arms. *See*  
 9 *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010).

10 California may be the first state to extend the use of background checks to  
 11 ammunition purchases, but *Bruen* made clear that the Second Amendment is not a  
 12 “regulatory straightjacket.” *Bruen*, 142 S. Ct. at 2133. It does not preclude  
 13 California from adopting a “‘variety’ of gun regulations,” *id.* at 2162 (Kavanaugh,  
 14 J., concurring), and “experiment[ing] with reasonable firearms regulations” to  
 15 address threats to public safety, *McDonald v. City of Chicago*, 561 U.S. 742, 785  
 16 (2010) (plurality opinion). California’s expansion of background checks to prevent  
 17 prohibited persons from acquiring ammunition is a permissible exercise of its  
 18 police powers, responsive to emerging concerns about the acquisition of firearms  
 19 by prohibited persons, and entirely consistent with the Second Amendment.

## 20 BACKGROUND

### 21 I. CALIFORNIA’S AMMUNITION LAWS

22 Federal and state law prohibit certain groups of people from possessing  
 23 firearms and ammunition, including felons, the dangerously mentally ill, and those  
 24 convicted of domestic violence. 18 U.S.C. § 922(g); Cal. Penal Code §§ 29800,  
 25 29805; Cal. Welf. & Inst. Code § 8103. The Ammunition Laws guard against the  
 26 purchase of ammunition by prohibited persons, by requiring face-to-face  
 27 transactions and background checks.

1           **A. Requirement for Face-to-Face Transactions**

2           As of January 2018, ammunition vendors must obtain a license. Cal. Penal  
3 Code § 30312(a)(1); Cal. Code Regs., tit. 11, §§ 4260-64. A licensed vendor must  
4 process all ammunition sales, deliveries, or transfers in face-to-face transactions.  
5 Cal. Penal Code §§ 30312, 30352, 30385(d). Californians may still purchase  
6 ammunition online or from other lawful sources. *Id.* § 30312(b). But those  
7 purchases must be received and processed in-person by a licensed vendor. *Id.*  
8 Similarly, residents bringing ammunition obtained outside the State into California  
9 must first deliver it to a licensed ammunition vendor for processing. *Id.* § 30314.

10           **B. Record-Keeping and Background Check Requirements**

11           As of July 2019, licensed vendors must record information about the  
12 purchase—including the purchaser’s driver’s license number and home address,  
13 and the brand, type, and amount of ammunition—and submit that information to the  
14 California Department of Justice (the “Department”). Cal. Penal Code  
15 §§ 30352(b)–(d), 30370(a). Vendors must also conduct background checks before  
16 selling or transferring ammunition, to ensure that the purchaser is not a prohibited  
17 person. *Id.* §§ 30352, 30370; Cal. Code Regs., tit. 11, §§ 4280–4289. Vendors  
18 determine most purchasers’ eligibility in one of two ways, as described below.<sup>2</sup>

19           **1. The Basic Check**

20           Vendors can determine whether any Californian is prohibited from purchasing  
21 ammunition by conducting a “Basic Ammunition Eligibility Check,” which costs  
22 \$19. Cal. Code Regs., tit. 11, § 4283. These checks authorize a purchase of any  
23 quantity of ammunition in a single transaction, meaning that a person must  
24 complete another Basic Check for any subsequent ammunition transaction (unless  
25

26 \_\_\_\_\_  
27           <sup>2</sup> The law exempts certain groups, such as sworn peace officers, from various  
28 requirements. *See* Cal. Penal Code §§ 30312(c), 30352(e). These exemptions are  
not at issue in this case.

1 that person can use one of the other background checks described below). *See* Cal.  
 2 Penal Code § 30370(a)(3).

3 To run a Basic Check, the vendor submits the purchaser's identifying  
 4 information—including their name, date of birth, current address, and driver's  
 5 license or "other government identification" number—to the Department through  
 6 the online Dealer Record of Sale Entry System ("DES"), which then checks to see  
 7 whether the purchaser is prohibited. Cal. Code Regs., tit. 11, § 4283(b)–(c).  
 8 Vendors begin this process by going to the DES website, and, in most cases,  
 9 populating the purchaser's information by swiping the purchaser's California  
 10 driver's license or other government ID card (generally, "ID") through a magnetic  
 11 card reader. Cal. Penal Code § 28180(a); *id.* § 28180(b) (identifying exceptions).<sup>3</sup>  
 12 Once the vendor enters the required information into DES, the system compares it  
 13 against four state databases to determine whether the purchaser is a prohibited  
 14 person: (1) the Automated Criminal History Record System; (2) the Mental Health  
 15 Firearms Prohibited System; (3) the California Restraining and Protective Order  
 16 System; and (4) the Wanted Persons System. Suppl. Morales Decl. in Supp. of  
 17 Def.'s Opp'n to Pls.' Mot. for Prelim. Inj. ("1st Morales Suppl. Decl.") (Dkt. 42)  
 18 ¶ 13. If the database search yields no hits, then the transaction is approved, and the  
 19 vendor may proceed with the sale. Cal. Penal Code § 30370(a)(3); Cal. Code Regs.,  
 20 tit. 11, § 4283(a). If, however, the purchaser's information results in a hit in one of  
 21 the databases, a Department analyst will manually review the submitted information  
 22 to check whether the purchaser is in fact a prohibited person. 1st Morales Suppl.

23 <sup>3</sup> Any ID that meets the requirements of the federal REAL ID Act of 2005,  
 24 Pub. L. No. 109-13, 119 Stat. 231, may be used for this purpose. Cal. Code Regs.,  
 25 tit. 11, § 4045.1; *see also* Cal. Penal Code § 30352(a)(2). Vendors can also conduct  
 26 background checks for purchasers who have IDs that do not comply with the REAL  
 27 ID Act, so long as those purchasers provide additional supporting documentation  
 28 showing lawful status in the United States, such as a passport or birth certificate.  
 Cal. Code Regs., tit. 11, § 4045.1. These IDs are visually distinct from REAL ID-  
 compliant ones because they feature the phrase "Federal Limits Apply" in the top  
 right corner.

Decl. ¶ 14. Purchasers who are not prohibited are approved and may take possession of the ammunition; but purchasers who are prohibited are denied, and the vendor cannot transfer the ammunition to them. Cal. Penal Code § 30370(d).

## 2. The Standard Check

Another way to obtain an ammunition background check is through a “Standard Ammunition Eligibility Check,” which currently costs \$1. Cal. Code Regs., tit. 11, § 4282; Cal. Penal Code § 30370(e). This check streamlines the background check process for purchasers who have up-to-date firearms records in the Department’s Automated Firearms System (“AFS”). Cal. Penal Code § 30370(a)(1). The Standard Check begins when the vendor enters the prospective purchaser’s information, including name, address, date of birth, and ID number, into DES by swiping the person’s ID through a magnetic card reader. Cal. Code Regs., tit. 11, § 4282(a), (c); Cal. Penal Code § 28180(a). DES then searches for a matching record in the AFS. Cal. Code Regs., tit. 11, § 4282(a). The AFS keeps a record of sales, transfers, and ownership of firearms. Cal. Penal Code § 11106.<sup>4</sup>

What happens next depends on whether the information entered into DES matches a record in the AFS. If there is a match, then DES will check the purchaser’s information against California’s Armed Prohibited Persons System. Morales Decl. in Supp. of Def.’s Opp’n to Pls.’ Mot. for Prelim. Inj. (“Morales Decl.”) (Dkt. 34-1) ¶ 19. That system “enforces California’s prohibitions on firearm possession by identifying ‘persons who have ownership or possession of a firearm’ yet who, subsequent to their legal acquisition of the firearm, have later come to ‘fall within a class of persons who are prohibited from owning or possessing a firearm’ due to a felony or violent misdemeanor conviction, domestic

<sup>4</sup> Records in the AFS have been created for handguns purchased from firearms vendors after 1995, and all long guns purchased from firearms vendors after 2013. Cal. Penal Code §§ 11106, 26905, 30000.

1 violence restraining order, or mental health-related prohibition.” *Bauer v. Becerra*,  
 2 858 F.3d 1216, 1219 (9th Cir. 2017) (quoting Cal. Penal Code §§ 30000, 30005).

3 If the purchaser’s identifying information does not appear in the Armed  
 4 Prohibited Persons System, the transaction is approved, and the purchaser may take  
 5 possession of the ammunition. *See* Cal. Code Regs., tit. 11, § 4282. However, a hit  
 6 in the Armed Prohibited Persons System results in a denial, and the purchaser may  
 7 not take possession of the ammunition. Cal. Penal Code § 30370(b), (d).

8 If the information entered into DES does not match a record in the AFS, the  
 9 transaction is rejected. Cal. Penal Code § 30370(d). Purchasers who experience a  
 10 rejection, however, may still seek to purchase ammunition in one of three ways.  
 11 First, they may utilize the Basic Check. Second, if they own a firearm that is not in  
 12 the AFS, they can create a new record by submitting a Firearms Ownership Report  
 13 to the Department. Or, they can purchase ammunition as part of a firearms  
 14 purchase, which will also create a record for them in the AFS that can then be used  
 15 for Standard Checks in future ammunition transactions. *See* Cal. Code Regs.,  
 16 tit. 11, § 4284. Third, a person who owns a firearm and believes that they have a  
 17 record in the AFS may update their records using the California Firearms  
 18 Application Reporting System on the Department’s website. Morales Decl. ¶ 20.

19 In transactions where the purchaser’s information matches a record in the  
 20 AFS, the background check is processed almost instantaneously, and the entire  
 21 transaction takes a matter of minutes. Morales Decl. ¶¶ 53–69.

22 People who have a transaction denied because the Department’s records show  
 23 that they are prohibited will receive a letter after the Standard Check is complete,  
 24 informing them of that fact and providing them details about how they can contest  
 25 that designation. 4th Suppl. Morales Decl. in Supp. of Def.’s Opp. to Pls.’ Mot. for  
 26 Prelim. Inj. (“4th Suppl. Morales Decl.”) (Dkt. 59) ¶ 5; *id.*, Exs. A, B. People who  
 27 have a Standard Check rejected, but who are not prohibited persons, may log on to  
 28 the California Firearms Application Reporting System, where they are told that the



1 information submitted in their background check does not match a record in the  
 2 AFS. Dkt. 15-2. Those people may update their records, so they can use Standard  
 3 Checks in the future. *See* Morales Decl. ¶ 20.

## 4 **II. PROCEDURAL HISTORY**

5 Plaintiffs in this action are seven California residents, four out-of-state  
 6 ammunition vendors, and the California Rifle & Pistol Association (CRPA), who  
 7 allege that the Ammunition Laws violate the Second Amendment, that the face-to-  
 8 face transaction requirements on purchases and transfers in California Penal Code  
 9 sections 30312 and 30314 violate the dormant Commerce Clause, and that section  
 10 30314 is preempted by 18 U.S.C. § 926A. Dkt. 9. Plaintiffs' preliminary  
 11 injunction motion sought an injunction against enforcement of the face-to-face  
 12 transaction requirements and the background check requirements in all their  
 13 applications, based on the Second Amendment and the dormant Commerce Clause.  
 14 Dkt. 32. On April 23, 2020, this Court issued the requested injunction, finding that  
 15 Plaintiffs were likely to succeed on their Second Amendment and dormant  
 16 Commerce Clause claims. Dkt. 60.

17 The Attorney General appealed and secured a stay pending appeal from the  
 18 Ninth Circuit. Dkt. 68. The appeal was argued and submitted in November 2020.  
 19 In March 2021, the Ninth Circuit vacated the submission and held the appeal in  
 20 abeyance pending issuance of the mandate in *Duncan v. Becerra*, an appeal of a  
 21 judgment issued by this Court in a Second Amendment challenge to California's  
 22 large-capacity magazine restrictions. Dkt. 71. After the Supreme Court issued its  
 23 decision in *Bruen*, the parties submitted supplemental briefing. In November 2022,  
 24 the Ninth Circuit vacated this Court's preliminary injunction order and remanded to  
 25 this Court "for further proceedings consistent" with *Bruen*. Dkt. 74.

26 On December 12, 2022, this Court held a status conference in this case, and  
 27 consolidated that conference with hearings in three other cases pending before the  
 28 Court: *Duncan v. Bonta*, No. 3:17-cv-01017-BEN-JLB; *Miller v. Bonta*, No. 3:19-

1 cv-01537-BEN-JLB; and *Fouts v. Bonta*, 3:19-cv-01662-BEN-JLB. During the  
 2 joint conference, counsel for the Attorney General requested time to conduct expert  
 3 discovery in support of the historical analysis required by *Bruen*, but the Court  
 4 denied the request and ordered the Attorney General to prepare surveys of relevant  
 5 laws within 30 days. Dec. 12, 2022 Hr’g Tr. at 38. On December 15, 2022, the  
 6 Court entered an Order requiring the Attorney General to “create, and the plaintiffs  
 7 shall meet and confer regarding, a survey or spreadsheet of relevant statutes, laws,  
 8 or regulations in chronological order” that shall “begin at the time of the adoption  
 9 of the Second Amendment and continue through twenty years after the Fourteenth  
 10 Amendment.” Dkt. 77. The Order also permitted Defendants to create a second  
 11 survey “covering a time period following that of the first list.” *Id.*<sup>5</sup> The Attorney  
 12 General filed the surveys on January 11, 2023. Dkt. 79.

## 13 ARGUMENT

### 14 I. THE ATTORNEY GENERAL OBJECTS TO THE EXPEDITED POST-REMAND 15 PROCEEDINGS

16 The Attorney General objects to the current post-remand proceedings and  
 17 expedited briefing schedule, which prejudices his ability to prepare a record that  
 18 *Bruen* requires, to conduct in-depth historical search into relevant laws, and to  
 19 address potential counterarguments. *See Defense Distributed v. Bonta*, No. CV 22-  
 20 6200-GW-AGR<sub>x</sub>, 2022 WL 15524977, at \*5 n.9 (C.D. Cal. Oct. 21, 2022) (“There  
 21 is no possibility this Court would expect [the California Attorney General] to be  
 22 able to present the type of historical analysis conducted in *Bruen* on 31 days’ notice  
 23 (or even 54 days’ notice).”). This brief responds to the Court’s December 15 Order,  
 24 but the Attorney General notes that there is no motion pending, and this is the first

25 \_\_\_\_\_  
 26 <sup>5</sup> The Order also provided that the parties were to agree within 20 days on  
 27 deposing Raymond Roth and Clayton Cramer. Roth is an expert witness for the  
 28 Attorney General in *Miller* and *Duncan*, while Cramer was a declarant for the  
 plaintiffs in *Duncan* and *Fouts*. Neither has provided testimony in this action.



1 opportunity for the Attorney to brief the effect of *Bruen* in this matter.<sup>6</sup> Consistent  
 2 with his position in other Second Amendment cases post-*Bruen*, the Attorney  
 3 General maintains that a reasonable discovery period, followed by dispositive  
 4 motions, is warranted in light of *Bruen* and the Ninth Circuit’s remand order.

5 To the extent that the Court has suggested that expert testimony may be  
 6 irrelevant and that a survey of historical laws may suffice to resolve this case, *see*  
 7 Dec. 12, 2022 Hr’g Tr. at 23-25, the Attorney General reiterates that expert  
 8 elucidation is fundamental to application of the *Bruen* standard. *Bruen*’s text-and-  
 9 history standard is not a “game of spot-the-analogy-across-the-ages.” *United States*  
 10 *v. Kelly*, No. 3:22-cr-00037, 2022 WL 17336578, at \*6 (M.D. Tenn. Nov. 16,  
 11 2022). Instead, *Bruen* requires “an evaluation of the challenged law in light of the  
 12 broader attitudes and assumptions demonstrated by those historical prohibitions.”  
 13 *Id.* at \*5 n.7. Expert testimony is needed to provide the requisite context for  
 14 interpreting the laws in the record. *Cf. Fouts v. Bonta*, 561 F. Supp. 3d 941, 951  
 15 (S.D. Cal. 2021) (“Digging into history is the work of historians rather than  
 16 judges.”), *vacated and remanded*, 2022 WL 4477732 (9th Cir. Sept. 22, 2022).

17 In addition, the Attorney General objects to the current proceedings to the  
 18 extent that the Court is considering this case together with *Duncan*, *Miller*, and  
 19 *Fouts*. Those cases concern hardware restrictions under the Second Amendment  
 20 and historical restrictions on certain dangerous weapons. This case, by contrast,  
 21 concerns the constitutionality of background checks and an entirely different  
 22 historical tradition of firearms regulation, as Plaintiffs’ counsel pointed out during  
 23 the joint conference. *See* Dec. 12, 2022 Hr’g Tr. at 47 (noting that *Rhode* may  
 24 “complicate things” because the analysis is a little bit different than these other

25 \_\_\_\_\_  
 26 <sup>6</sup> Plaintiffs in this case assert claims other than their Second Amendment  
 27 claim, namely, dormant Commerce Clause and federal preemption claims. Those  
 28 causes of action remain to be addressed, and the Attorney General will not address  
 them in this brief, which is limited to the constitutionality of the Ammunition Laws  
 under the Second Amendment. *See* Dkt. 77.

cases”). The four cases should not be consolidated. *See* Fed. R. Civ. P. 42 (allowing consolidation if the actions “involve a common question of law or fact”).

The Attorney General preserves his objections to the post-remand proceedings. *See Miller*, Dkt. 137 at 73-77; *Duncan*, Dkt. 118 at 56-60. Nevertheless, the Attorney General has complied with the Court’s Order and filed surveys of relevant laws demonstrating a historical tradition with which the Ammunition Laws are consistent. Even assuming Plaintiffs have met their burden at the textual stage of the *Bruen* analysis and have established standing in this action—and they have not, *see infra* at 10–18—the material submitted here and the applicable case law are sufficient to uphold the Ammunition Laws under *Bruen*.

## **II. PLAINTIFFS LACK STANDING FOR ANY AS-APPLIED CHALLENGE, AND THEIR FACIAL CHALLENGE FAILS OUTRIGHT**

### **A. Plaintiffs Lack Standing for any As-Applied Challenge**

Plaintiffs have not demonstrated that they have standing to challenge the Ammunition Laws—they have not shown that any Plaintiff has been prohibited from purchasing ammunition in California. “[C]onspicuously missing from this lawsuit is any honest-to-God resident of [California] complaining that he or she cannot lawfully buy [ammunition]” because of the Ammunition Laws. *Teixeira v. County of Alameda*, 873 F.3d 670, 680-81 (9th Cir. 2017) (en banc) (quotation marks omitted). “A person to whom a statute properly applies can’t obtain relief based on arguments that a differently situated person might present.” *United States v. Chovan*, 735 F.3d 1127, 1135 (9th Cir. 2013) (internal quotation marks and citation omitted). Here, no individual plaintiff alleged in the operative complaint that the Ammunition Laws prevented him or her from purchasing ammunition.

Nor does CRPA have standing. Organizations may “assert standing on behalf of their own members, or in their own right.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021) (citation omitted). To sue on its own behalf, an organization must establish that it has suffered “both a diversion of its resources

1 and a frustration of its mission.” *La Asociacion de Trabajadores de Lake Forest v.*  
 2 *City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quotation marks  
 3 omitted). But CRPA submitted no evidence in this regard. Nor does CRPA have  
 4 associational standing, which requires a showing (among other things) that “neither  
 5 the claim asserted nor the relief requested requires the participation of individual  
 6 members in the lawsuit.” *San Diego Cnty. Gun Rights Comm’n v. Reno*, 98 F.3d  
 7 1121, 1130-31 (9th Cir. 1996). CRPA cannot meet that requirement here, because  
 8 determining whether the Ammunition Laws have actually prohibited any of their  
 9 members from purchasing ammunition requires a case-by-case evaluation of the  
 10 facts and circumstances of each person’s situation.<sup>7</sup>

### 11 **B. Plaintiffs’ Facial Challenge Necessarily Fails**

12 As with any plaintiff asserting a facial claim, Plaintiffs bear the burden of  
 13 showing that “no set of circumstances exists under which the [Ammunition Laws]  
 14 would be valid.” *Duncan v. Bonta*, 19 F.4th 1087, 1101 (9th Cir. 2021) (en banc)  
 15 (citation omitted) (quoting *Salerno*, 481 U.S. at 745), *vacated and remanded on*  
 16 *other grounds*, 49 F.4th 1228 (9th Cir. 2022) (Mem).<sup>8</sup> In identifying only a limited  
 17 number of *applications* in which the Ammunition Laws allegedly frustrated the

18  
 19 <sup>7</sup> This Court’s prior reasoning in rejecting the Attorney General’s argument  
 20 that Plaintiffs lack standing rests implicitly on the overbreadth doctrine, which  
 21 “essentially argues that a statute could not be enforced against a plaintiff, because it  
 22 could not be enforced against someone else.” *Hightower v. City of Boston*, 693 F.3d  
 23 61, 81 (1st Cir. 2012). That doctrine, however, does not apply outside the First  
 24 Amendment context. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“[W]e  
 25 have not recognized an ‘overbreadth’ doctrine outside the limited context of the  
 26 First Amendment.” (citation omitted)); *Hightower*, 693 F.3d at 82–83 (collecting  
 27 cases rejecting overbreadth arguments in Second Amendment context); *Wiese v.*  
 28 *Becerra*, 306 F. Supp. 3d 1190, 1202 (E.D. Cal. 2018) (refusing to apply  
 overbreadth doctrine in Second Amendment case).

<sup>8</sup> Although the Supreme Court and this Court have “called into question the  
 continuing validity of the *Salerno* rule in the context of First Amendment  
 challenges,” *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579  
 n.3 (9th Cir. 2008) (en banc), *Salerno* “remains binding law in the Ninth Circuit,”  
*Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1104 n.6 (9th Cir. 2016).

1 ability of some purchasers to complete certain ammunition sales, Plaintiffs have  
2 failed to properly assert a facial attack on the Ammunition Laws.

3 Even under the more relaxed standard for facial challenges that courts  
4 sometimes use, California's laws have a "plainly legitimate sweep." *Jackson v.*  
5 *City & Cnty. of S.F.*, 746 F.3d 953, 961-62 (9th Cir. 2014); *see also Wash. State*  
6 *Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (identifying  
7 consensus on "plainly legitimate sweep" standard"). California may, consistent  
8 with the Second Amendment, prohibit felons, those without lawful status, and the  
9 dangerously mentally ill from procuring ammunition. *See Bruen*, 142 S. Ct. at  
10 2162 (Kavanaugh, J., concurring). Although Plaintiffs object to the particulars of  
11 California's background check system for ammunition purchases, when considering  
12 a facial challenge, courts "consider only the text of the [laws], not [their]  
13 application" to a particular circumstance. *Calvary Chapel Bible Fellowship v. City*  
14 *of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020). On their face, the Ammunition  
15 Laws allow residents to purchase ammunition unless they are prohibited from  
16 purchasing or possessing firearms and ammunition. *See* Cal. Pen. Code §§ 30352,  
17 30370; Cal. Code Regs., tit. 11, §§ 4282-4283. Plaintiffs do not claim that the  
18 designation of any particular category of prohibited persons is unconstitutional. *See*  
19 18 U.S.C. § 922(g); Cal. Penal Code §§ 29800, 29805; Cal. Welf. & Inst. Code  
20 § 8103.<sup>9</sup> Nor do they claim that background checks are an unconstitutional method  
21 for preventing prohibited persons from purchasing firearms or obtaining concealed-  
22 carry permits. Plaintiffs only challenge the constitutionality of the Ammunition  
23 Laws. *See* 1st Am. Compl. at 31-32. Although this Court has previously found the

24  
25 <sup>9</sup> To the extent Plaintiffs may claim that a particular category of prohibited  
26 persons is unconstitutional, *see, e.g., United States v. Rahimi*, \_\_\_ F.4th \_\_\_, 2023  
27 WL 1459240, at \*1 (5th Cir. Feb. 2, 2023) (striking down 18 U.S.C. 922(g)(8) for  
28 people subject to restraining orders), such a claim would not amount to a facial  
challenge to the Ammunition Laws' background check requirement. And there is  
no evidence that any of the Plaintiffs have been unable to purchase ammunition for  
being a prohibited person under any particular provision of state or federal law.

1 Ammunition Laws constitutionally problematic based on their implementation  
 2 during the earliest months that the laws were in effect, courts “may not resolve  
 3 questions of constitutionality with respect to each potential situation that might  
 4 develop, especially when [a] moving party does not demonstrate that the legislation  
 5 would be unconstitutional in a large fraction of relevant cases.” *Jackson*, 746 F.3d  
 6 at 962 (quotation marks omitted).

### 7 8 **III. PLAINTIFFS’ SECOND AMENDMENT CLAIMS FAIL UNDER *BRUEN***

#### 9 **A. *Bruen*’s Text-and-History Standard for Analyzing Second Amendment Claims**

10 As a threshold issue, *Bruen* directs courts to assess whether the “Second  
 11 Amendment’s “plain text” covers an individual’s conduct,” *Bruen*, 142 S. Ct. at  
 12 2126—*i.e.*, whether the regulation at issue prevents any “people” from “keep[ing]”  
 13 or “bear[ing]” “Arms” for lawful purposes, U.S. Const. amend. II. If so, the  
 14 Constitution “presumptively protects that conduct.” *Bruen*, 142 S. Ct. at 2126. The  
 15 plaintiff bears the burden of establishing that the plain text applies, by  
 16 demonstrating that each of the “textual elements” of the Second Amendment’s  
 17 operative clause covers the proposed course of conduct. *Id.* at 2134 (quoting  
 18 *Heller*, 554 U.S. at 592); *see also Nat’l Ass’n for Gun Rights, Inc. v. City of San*  
 19 *Jose*, No. 22-cv-501-BLF, \_\_ F. Supp. 3d \_\_, 2022 WL 3083715, at \*8 (N.D. Cal.  
 20 Aug. 3, 2022) (“If the conduct at issue is covered by the text of the Second  
 21 Amendment, the burden then *shifts* to the government to show why the regulation is  
 22 consistent with the Nation’s historical tradition of firearm regulation” (emphasis  
 23 added)). *Bruen* makes clear that a party challenging a law under the Second  
 24 Amendment bears this threshold, textual burden. *See Bruen*, 142 S. Ct. at 2134  
 25 (noting that the government “d[id] not dispute” that the plain text of the Second  
 26 Amendment covered the plaintiffs’ proposed conduct); *see also Defense Distributed*  
 27 *v. Bonta*, 2022 WL 15524977, at \*5 (C.D. Cal. Oct. 21, 2022) (“Much as [plaintiff]  
 28 would like to move history and tradition forward in the course of relevant analysis

1 under *Bruen*, its attempt does not survive a careful, and intellectually-honest,  
 2 reading of that decision.”); *Ocean State Tactical, LLC v. State of Rhode Island*,  
 3 2022 WL 17721175, at \*12 (D.R.I. Dec. 14, 2022) (“Although it is their burden to  
 4 show that large-capacity magazines fall within the purview of the Second  
 5 Amendment, *the plaintiffs* offer no expert opinion on the meaning of the word  
 6 ‘Arms.’” (emphasis added)); *Or. Firearms Fed’n, Inc. v. Brown*, \_\_ F. Supp. 3d \_\_,  
 7 2022 WL 17454829, at \*9 (D. Or. Dec. 6, 2022) (“*Plaintiffs have not shown*, at this  
 8 stage, that magazines specifically capable of accepting more than ten rounds of  
 9 ammunition are necessary to the use of firearms for self-defense.” (emphasis  
 10 added)), *notice of appeal filed*, No. 22-36011 (9th Cir. Dec. 7, 2022).

11 If a challenged restriction regulates conduct protected by the “plain text” of  
 12 the Second Amendment, *Bruen* then directs the government to justify its regulation  
 13 by showing that the law is “consistent with this Nation’s historical tradition of  
 14 firearm regulation.” *Bruen*, 142 S. Ct. at 2126. And while the Court recognized  
 15 that the historical analysis conducted at the first step of the two-step approach that  
 16 lower courts had adopted for analyzing Second Amendment claims was “broadly  
 17 consistent with *Heller*,” *id.* at 2127, it clarified how that analysis should proceed in  
 18 important respects. In some cases, the Court explained, this historical inquiry will  
 19 be “fairly straightforward,” such as when a challenged law addresses a “general  
 20 societal problem that has persisted since the 18th century.” *Id.* at 2131. But in  
 21 others—particularly those where the challenged laws address “unprecedented  
 22 societal concerns or dramatic technological changes”—the Court recognized that  
 23 this historical analysis requires a “more nuanced approach.” *Id.* at 2132.

24 Under this “more nuanced approach,” governments are not required to identify  
 25 a “historical *twin*,” and need only identify a “well-established and representative  
 26 historical *analogue*.” *Bruen*, 142 S. Ct. at 2133 (emphasis in original). Thus, a  
 27 modern-day regulation need not be a “dead ringer for historical precursors” to pass  
 28 constitutional muster. *Id.* Instead, in evaluating whether a “historical regulation is



a proper analogue for a distinctly modern firearm regulation,” *Bruen* directs courts to determine whether the two regulations are “‘relevantly similar.’” *Id.* at 2132 (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993)). The Court identified “two metrics” by which regulations must be “relevantly similar under the Second Amendment”: “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.* at 2133. The Court explained that those dimensions are especially important because “‘individual self-defense is “the *central component*” of the Second Amendment right.’” *Id.* (quoting *McDonald*, 561 U.S. at 767, and *Heller*, 554 U.S. at 599). After *Bruen*, a modern regulation that restricts conduct protected by the plain text of the Second Amendment is constitutional if it “impose[s] a comparable burden on the right of armed self-defense” as its historical predecessors that is “comparably justified.” *Id.*

**B. Plaintiffs Have Not Shown That the Ammunition Laws Burden Conduct Covered by the Plain Text of the Second Amendment**

Plaintiffs cannot carry their burden of showing that the Second Amendment’s text covers their intended conduct, which is essentially to purchase ammunition without any kind of verification of whether they may lawfully do so. To determine whether the plain text covers an individual’s conduct, the Court “must first identify and delineate the specific course of conduct at issue.” *Defense Distributed*, 2022 WL 15524977, at \*4 (quoting *Nat’l Ass’n for Gun Rights, Inc. v. City of San Jose*, 2022 WL 3083715, at \*8 (N.D. Cal. Aug. 3, 2022))). The proposed course of conduct must be defined with specificity—not simply “purchasing ammunition”—for the textual stage of the analysis to have any meaning. For example, in *United States v. Reyna*, the district court characterized the proposed course of conduct as “possession of a firearm *with an obliterated serial number*” and not more generally as “mere possession [of a firearm],” because if the conduct was “mere possession,” any number of other challenged regulations would similarly boil down to mere

1 possession, then promptly and automatically proceed to” the historical stage of the  
2 analysis. 2022 WL 17714376, at \*4 (N.D. Ind. Dec. 15, 2022) (emphasis added).

3 Here, Plaintiffs wish to purchase ammunition without passing a background  
4 check. They also wish to purchase ammunition without having to complete a face-  
5 to-face transaction at a licensed firearms dealer, and without the dealer retaining  
6 records of the transaction. This conduct is not covered by the plain text of the  
7 Second Amendment. That is, these requirements do not prevent any “people” from  
8 “keep[ing]” or “bear[ing]” “Arms” for lawful purposes. Nor do they prevent any  
9 “law-abiding, responsible citizens” from keeping, carrying, or “us[ing] arms for  
10 self-defense.” *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635)  
11 (quotation marks omitted). This is evidenced by the fact that not a single plaintiff  
12 was even substantially delayed—let alone prevented—from obtaining ammunition  
13 because of these laws. *See supra* at 10–11.

14 Nor does a general desire for “access to ammunition” fall within the plain text  
15 of the Second Amendment simply because it relates to the right to keep and bear  
16 arms. It is not appropriate to go beyond the plain text to infer a “penumbra” of  
17 other covered activities beyond keeping and bearing arms because such an  
18 interpretation “is quite-clearly not a ‘plain text’ analysis, required under *Bruen*.”  
19 *Defense Distributed*, 2022 WL 15524977, at \*4. And it cannot be correct that all  
20 requirements or conditions precedent applied to any aspect of firearms use and  
21 possession, regardless of their content or effect, are “covered” by the Second  
22 Amendment’s “plain text.” The purchasing of ammunition “may be subjected to  
23 governmental restrictions.” *Jackson*, 746 F.3d at 970. *Bruen* did not change this.

24 Indeed, several Justices emphasized that the decision in *Bruen* did not  
25 “disturb[] anything” that the Court previously said “about restrictions that may be  
26 imposed on the possession or carrying of guns.” 142 S. Ct. at 2157 (Alito, J.,  
27 concurring); *id.* at 2162 (Kavanaugh, J., concurring). Rather, *Bruen* explicitly  
28 acknowledges that “nothing” in its analysis casts doubt on the constitutionality of



1 licensing regimes that require applicants to “undergo a background check or pass a  
 2 firearms safety course” as a condition of carrying firearms in public. *Id.* at 2138  
 3 n.9. Concurring justices confirmed that “presumptively lawful regulatory  
 4 measures” described in *Heller*—which include but are not limited to laws  
 5 “imposing conditions and qualifications on the commercial sale of arms” and  
 6 “longstanding prohibitions on the possession of firearms by” prohibited persons—  
 7 remain presumptively lawful. *Id.* at 2162 (Kavanaugh, J., concurring). These are  
 8 the exact types of regulations that the Ammunition Laws codify.

9 Another clear indication that the Ammunition Laws fall outside of the plain  
 10 text of the Second Amendment—and thus pass constitutional muster without the  
 11 need for any historical analysis—is *Bruen*’s explicit approval of “background  
 12 check[s]” or requirements to “pass a firearms safety course,” so long as the schemes  
 13 are not “put toward abusive ends” where “lengthy wait times” or “exorbitant fees  
 14 deny ordinary citizens their right to public carry.” *Bruen*, 142 S. Ct. at 1238 n.9.  
 15 Background check requirements are constitutionally permissible, “subject of course  
 16 to an as-applied challenge if a shall-issue licensing regime does not operate in that  
 17 manner in practice.” *Id.* at 2162 (Kavanaugh, J., concurring). Here, the required  
 18 backgrounds checks are neither “abusive” nor legally burdensome. For purchasers  
 19 using the Standard Check background check option, the required check takes, on  
 20 average, five to ten minutes and currently costs only \$1. Morales Decl. ¶¶ 53–69;  
 21 *id.*, Ex. 6 at 27. For others who use the alternative Basic Check option, it takes a  
 22 day or two to complete and costs \$19. 2d Suppl. Decl. of Mayra G. Morales in  
 23 Supp. of Def.’s Opp’n to Pls.’ Mot. for Prelim. Inj. (“2d Suppl. Morales Decl.”)  
 24 (Dkt. 48) ¶ 15; *id.*, Ex. 6 at 27. Rejections of persons who are not otherwise  
 25 prohibited from possessing ammunition are rare and can be handled by addressing  
 26 the reason for the rejection (by, for example, updating records), using a different  
 27 method of background check, or both. 3d Suppl. Morales Decl. ¶ 26. The  
 28 Ammunition Laws are thus consistent with the standards for a constitutional

1 background-check system described in *Bruen*. The Ammunition Laws establish the  
 2 same type of “condition precedent” to purchasing ammunition that the Ninth Circuit  
 3 has approved before in the context of purchasing firearms, *Silvester v. Harris*, 843  
 4 F.3d 816, 830–31 (9th Cir. 2016) (Thomas, J., concurring), and that *Bruen*  
 5 explicitly recognizes as constitutional, 142 S. Ct. at 1238 n.9; *id.* at 2162  
 6 (Kavanaugh, J., concurring); Dec. 12, 2022 Hr’g Tr. at 48 (“The *Bruen* case did say  
 7 that background checks were ok, right, with regard to the concealed carry.”).  
 8 Because the Ammunition Laws do not prevent law-abiding citizens from keeping or  
 9 bearing arms of any sort, or the ammunition necessary to operate them, they do not  
 10 burden conduct covered by the plain text of the Second Amendment.

### 11 **C. The Ammunition Laws Are Consistent with Traditions of** 12 **Firearms Regulation**

13 Even if Plaintiffs could show that the conduct regulated by the Ammunition  
 14 Laws is covered by the “plain text” of the Second Amendment and the original  
 15 public meaning of that text (they have not), California’s Ammunition Laws are  
 16 consistent with the Nation’s traditions of firearm regulation and should be upheld.

#### 17 **1. This Case Requires a “More Nuanced” Approach**

18 A “more nuanced” analogical approach is called for in assessing the  
 19 similarities between the Ammunition Laws and the surveyed historical laws. *See*  
 20 *Bruen*, 142 S. Ct. at 2131–32. In a case that proceeds to the historical stage of the  
 21 *Bruen* analysis, the government need not identify a “historical *twin*” or a “dead  
 22 ringer”; it can justify a modern restriction by identifying a “relevantly similar”  
 23 restriction enacted when the Second or Fourteenth Amendments were ratified. *Id.*  
 24 at 2132–33. And when the challenged law addresses “unprecedented societal  
 25 concerns or dramatic technological changes,” the courts should engage in a “*more*  
 26 nuanced approach.” *Id.* at 2131–32 (emphasis added).

27 Here, the Ammunition Laws must be subject to a “more nuanced” analysis of  
 28 the relevant history because the Supreme Court has expressly endorsed background

1 checks as a condition to obtain a concealed-carry permit, *see Bruen*, 142 S. Ct. at  
 2 2138 n.9, even though background checks related to the acquisition or carrying of  
 3 firearms did not appear until the early 20th century. *See* Dkt. 36-1 at 6–9  
 4 (summarizing history of background check requirements dating back to New  
 5 York’s 1911 Sullivan Law); *see also Silvester*, 843 F.3d at 824. The Ammunition  
 6 Laws are relevantly similar to those laws, and thus should be subject to the same  
 7 degree of nuance in the historical analysis. Moreover, the Ammunition Laws’  
 8 background check requirements implicate “dramatic technological changes” since  
 9 1791 or 1868 because they became possible only after the development of a reliable  
 10 and fast internet, computer databases, and other technologies that enable the  
 11 accurate and efficient processing of ammunition sales, which happen more  
 12 frequently than firearm sales.<sup>10</sup>

13 Moreover, the Ammunition Laws address the “unprecedented societal  
 14 concerns [and] dramatic technological changes,” *Bruen*, 142 S. Ct. at 2132,  
 15 presented by the modern-day proliferation of “ghost guns.” Ghost guns are self-  
 16 assembled fully-functional firearms that are typically made from user-friendly kits  
 17 purchased online. 87 Fed. Reg. at 24662. And they are typically assembled  
 18 without a background check to confirm that the person is not a prohibited person.  
 19 As the California Legislature recognized in passing legislation to regulate these  
 20 modern firearms, ghost guns have become “a leading source of crime guns,  
 21 including firearms built by people such as minors who cannot legally possess or  
 22 acquire firearms in our state, as well as individuals seeking to conceal their  
 23 involvement in firearm trafficking and other crimes.” Assembly Bill No. 1621

24 <sup>10</sup> The Ammunition Laws were also necessitated by technological changes in  
 25 ammunition, including substantially more lethal higher-caliber rounds than what  
 26 was commonly available at the founding. *See* Margot Sanger-Katz & Quoc Trung  
 27 Bui, *People Kill People. But the Bullets Seem to Matter*, N.Y. Times, Mar. 27,  
 28 2019 (describing popularity of higher-caliber rounds used in semiautomatic  
 firearms in the 1990s, such as 9 millimeter rounds, that are capable of causing  
 significantly greater damage than smaller caliber rounds), <https://nyti.ms/3v0VPcB>.

(Reg. Sess. 2021-2022) (“AB 1621”) § 1(a)(5). The manufacture and sale of these unregulated and unserialized firearms has “caused enormous harm and suffering, hampered the ability of law enforcement to trace crime guns and investigate firearm trafficking and other crimes, and dangerously undermined the effectiveness of laws and protections critical to the health, safety, and well-being of Californians.” AB 1621 § 1(a). The Ammunition Laws serve as a backstop to the acquisition of firearms by prohibited persons: with the proliferation of such ghost guns, background checks for ammunition purchases confirm that firepower is not being acquired by prohibited persons. The laws were made possible by and address “dramatic technological changes,” *Bruen*, 142 S. Ct. at 2132, so a more nuanced approach is required here.

## 2. The Ammunition Laws Are Relevantly Similar to Laws Restricting Possession of Firearms and Ammunition

In compliance with the Court’s Order, Dkt. 77, the Attorney General prepared two surveys—one listing relevant laws from the pre-founding era to 1888, Dkt. 79-1, and another listing relevant laws from 1889 to the 1930s, Dkt. 79-2—as well as a third survey that included Plaintiffs’ positions concerning the relevance of those laws, Dkt. 79-3.<sup>11</sup> The Attorney General’s surveys identify hundreds of laws restricting the ability for certain designated groups to possess weapons, as well as

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<sup>11</sup> During the December 12 hearing, the Court characterized an 1888 cut-off as “an arbitrary and capricious number.” Dec. 12, 2022 Hr’g Tr. at 30. In *Bruen*, the Supreme Court did not specify a 20-year limit after the ratification of the Fourteenth Amendment. *See* 142 S. Ct. at 2163 (Barrett, J., concurring) (noting that the Court did not answer the question of “[h]ow long after ratification may subsequent practice illuminate original public meaning?”).

1 laws requiring an oath of allegiance or loyalty to possess arms [47, 48, 50–54,  
2 106].<sup>12</sup> These laws demonstrate that the Ammunition Laws are permissible.<sup>13</sup>

3 The courts have recognized that these laws comprise a robust tradition of  
4 firearm regulation that can justify contemporary restrictions on the ability of certain  
5 individuals to acquire and possess firearms and ammunition. *See Vongxay*, 594  
6 F.3d at 1118 (noting that “the right to bear arms was ‘inextricably . . . tied to’ the  
7 concept of a ‘virtuous citizen[ry]’ that would protect society through ‘defensive use

8 <sup>12</sup> Most of the surveyed laws were based on race, nationality, or enslaved  
9 status and were enacted before ratification of the Thirteenth and Fourteenth  
10 Amendments. These laws are morally repugnant and would obviously be  
11 unconstitutional today. They are provided only as evidence of a regulatory tradition  
12 that the courts have already recognized. *See infra* at 18–25. The Attorney General  
13 in no way condones laws that target certain groups on the basis of race, gender,  
14 nationality, or other protected characteristic, but these laws are part of the history of  
15 the Second Amendment and may be relevant to determining the traditions that  
16 define its scope, even if they are inconsistent with other constitutional guarantees.  
17 *See Bruen*, 142 S. Ct. at 2150–51 (citing *Dred Scott v. Sandford*, 19 How. 393  
18 (1857) (enslaved party)). Reference to a particular historical analogue does not  
19 endorse the analogue’s *application* in the past. Rather, it can confirm the *existence*  
20 of the doctrine and corresponding limitation on the Second Amendment right. *See*  
21 William Baude & Stephen E. Sachs, *Originalism & the Law of the Past*, 37 L. &  
22 Hist. Rev. 809, 813 (2019) (“Present law typically gives force to past *doctrine*, not  
23 to that doctrine’s role in past society.”); *see also* Adam Winkler, *Racist Gun Laws*  
24 *and the Second Amendment*, 135 Harv. L. Rev. F. 537, 539 (2022) (“Yet there will  
25 arise situations in which even a racially discriminatory gun law of the past might  
26 provide *some* basis for recognizing that lawmakers have a degree of regulatory  
27 authority over guns.”).

28 <sup>13</sup> To the extent the surveys do not provide information on repeal status or  
judicial review, it is Plaintiffs’ burden to rebut the historical record assembled by  
the Attorney General and provide potentially adverse information about the  
analogues. This Court’s Order did not impose the burden of identifying any repeal  
or adverse judicial opinions solely on the Attorney General, but required Plaintiffs  
to provide information that they view as relevant to the Court’s analysis in this  
regard. *See* Dec. 12, 2022 Hearing Tr. at 9–12 (“So I would suggest *both sides*, if  
you can, please do that for me.” (emphasis added)). And *Bruen* itself did not  
envision defendants providing the entire historical record for review, but rather  
viewed this as a task of all parties; the Court noted that judges may “decide a case  
based on the historical record compiled by *the parties*.” *Bruen*, 142 S. Ct. at 2130  
n.6 (emphasis added) (citation omitted). In any event, the tradition relied upon here  
has been well-recognized by the courts.



1 of arms against criminals, oppressive officials, and foreign enemies alike,’ and that  
 2 ‘the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e.  
 3 criminals)’”); *Duncan*, 19 F.4th at 1157 & n.27 (9th Cir. 2021) (Bumatay, J.,  
 4 dissenting) (“Prohibiting the possession of arms by those found by the state to be  
 5 dangerous, like violent criminals, dates to the Founding.” (citing *Kanter v. Barr*,  
 6 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting)).<sup>14</sup> As explained by then-  
 7 Judge Barrett, history “support[s] the proposition that the state can take the right to  
 8 bear arms away from a category of people that it deems dangerous.” *Kanter*, 919  
 9 F.3d at 464 (Barrett, J., dissenting). This power “is not limited to case-by-case  
 10 exclusions of persons who have been shown to be untrustworthy with weapons, nor  
 11 need these limits be established by evidence presented in court.’ Instead the  
 12 legislature can make that judgment on a class-wide basis. And it may do so based  
 13 on present-day judgments about categories of people whose possession of guns  
 14 would endanger the public safety.” *Id.* (citations omitted).

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 16 <sup>14</sup> See also *Nat’l Rifle Ass’n of Am., Inc. v. Bur. of Alcohol, Tobacco,*  
 17 *Firearms & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012) (noting the  
 18 “longstanding tradition of targeting select groups’ ability to access and to use arms  
 19 for the sake of public safety”); *United States v. Carpio-Leon*, 701 F.3d 974, 980  
 20 (5th Cir. 2012) (noting colonial laws restricting ownership of firearms by “potential  
 21 subversives” and “suspect populations” who were considered disloyal or  
 22 dangerous”); *Folajtar v. Att’y Gen. of the United States*, 980 F.3d 897, 905 (3d Cir.  
 23 2020) (explaining that excluding felons from “the people” comports with principles  
 24 supporting founding-era disarmament of those who were unwilling to abide by  
 25 societal norms and thereby placing them outside the community); *Binderup v.*  
 26 *Attorney General of the United States*, 836 F.3d 336, 349 (3d Cir. 2016) (noting  
 27 that “[c]rimes committed”—violent or not—were thus an independent ground for  
 28 exclusion from the right to keep and bear arms” and that “there is reason to believe  
 that felon disarmament has roots that are even more ancient”); *States v. Carter*, 669  
 F.3d 411, 415 (4th Cir. 2012) (“[N]othing in the historical record suggests a popular  
 understanding of the Second Amendment at the time of the founding that extended  
 to preserving gun rights for groups who pose a particular risk of using firearms . . .  
 against innocent people, including those who committed drug felonies.”); *Medina v.*  
*Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) (“[D]uring the revolution, the states  
 of Massachusetts and Pennsylvania confiscated weapons belonging to those who  
 would not swear loyalty to the United States.”).

1 The Supreme Court has indicated that 20th century “prohibitions on the  
 2 possession of firearms by felons and the mentally ill” are examples of  
 3 “presumptively lawful regulatory measures.” *Bruen*, 142 S. Ct. at 2162  
 4 (Kavanaugh, J., concurring) (citation omitted). The first category of prohibited  
 5 persons designated under federal law, convicted felons, did not appear until 1938.  
 6 *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Yet,  
 7 those restrictions, which result in total disarmament, are “presumptively lawful.”  
 8 *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring). The Supreme Court has  
 9 also approved of background checks based on objective criteria to ensure that  
 10 prohibited people are not authorized to carry firearms in public. *See id.* at 2138 n.9.  
 11 The Supreme Court’s sanction of such background checks for the public carry of  
 12 firearms logically extends to background checks for firearm purchases as well. *Or.*  
 13 *Firearms Fed’n*, 2022 WL 17454829, at \*15 (relying on the “clear guidance from  
 14 *Bruen*” in holding that permit-to-purchase requirement, including successful  
 15 completion of a background check, does not violate the Second Amendment). The  
 16 first background check system for firearm purchases was enacted in 1998, *see*  
 17 *Printz v. United States*, 521 U.S. 898, 902–03 (1997) (describing the initial  
 18 implementation of National Instant Criminal Background Check System in 1998  
 19 following enactment of the Brady Act of 1993), and states did not begin requiring  
 20 background checks for firearm sales or carry permits until the early 20th century,  
 21 *see* Dkt. 36-1 at 6–9. Despite appearing in the 20th century, these restrictions and  
 22 requirements are “‘lineal descendants’ of historical laws banning dangerous people  
 23 from possessing guns.” *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting).<sup>15</sup>

24 As with those requirements, California’s Ammunition Laws ensure that people  
 25 prohibited under federal and state law from possessing firearms or ammunition are

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26  
 27 <sup>15</sup> These 20th century developments are relevant because they are consistent  
 28 with earlier traditions. *Cf. Bruen*, 142 S. Ct. at 2153 n.28 (discounting probative  
 value of 20th century laws that “contradict[ed] earlier evidence”).

1 unable to acquire ammunition. Contemporary background checks, like the  
 2 categories of persons prohibited from possessing firearms or ammunition, *see*  
 3 18 U.S.C. § 922(g); Cal. Penal Code §§ 29800, 29805; Cal. Welf. & Inst. Code  
 4 § 8103, are rooted in the historical tradition—dating back to the founding—of  
 5 disarming groups of people perceived to be dangerous or unvirtuous. The  
 6 Ammunition Laws are consistent with that tradition according to the two metrics  
 7 identified in *Bruen*: “how and why the regulations burden a law-abiding citizen’s  
 8 right to armed self-defense.” *Bruen*, 142 S. Ct. at 2133.

9 The Ammunition Laws impose a comparably minimal burden on the right of  
 10 “law-abiding, responsible citizens,” *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554  
 11 U.S. at 635), to acquire ammunition. The background check requirement uses  
 12 objective criteria to determine whether an ammunition purchaser is prohibited  
 13 under federal or state law, which is similar to the background check requirements  
 14 approved of by the Supreme Court. *See id.* at 2138 n.9. The in-person  
 15 requirements are also minimally burdensome “conditions and qualifications on the  
 16 commercial sale of arms,” which are not called into question by *Bruen*. *Id.* at 2162  
 17 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626). They mirror federal  
 18 requirements for firearm purchases, as federal law generally prohibits “the sale of  
 19 guns ‘to a person who does not appear in person at [the dealer’s] business  
 20 premises.’” *Abramski v. United States*, 573 U.S. 169, 181 (2014) (citing 18 U.S.C.  
 21 § 922(c)). Finally, the recordkeeping and reporting requirements applicable to  
 22 licensed ammunition vendors, *see* Cal. Penal Code § 30352, do not burden their  
 23 customers’ right to armed self-defense.

24 Moreover, any minimal burden imposed by the Ammunition Laws is  
 25 comparably justified in seeking to ensure that only law-abiding, responsible citizens  
 26 are able to purchase ammunition and thus use firearms. Both the Ammunition  
 27 Laws and the background checks sanctioned by the Supreme Court are means of  
 28 enforcing existing prohibitions under federal and state law. In 2016, decided to



1 close “loopholes that leave communities throughout the state vulnerable to gun  
 2 violence and mass shootings.” Cal. Sec’y of State, Cal. Gen. Election Official  
 3 Voter Info. Guide 164 (2016), <https://bit.ly/3Y5MlcB>. Among other things,  
 4 Proposition 63 sought to close a loophole in ammunition sales. While California  
 5 law required background checks for people purchasing firearms, no similar  
 6 requirement existed for those purchasing ammunition. *Id.* As a result, “[a]ny  
 7 violent felon or dangerously mentally ill person” could “walk into a sporting goods  
 8 store or gun shop in California and buy ammunition, no questions asked.” *Id.*  
 9 Recognizing that “background checks work” and stop “roughly 225 felons from  
 10 buying firearms every day,” the voters decided that the State “should require  
 11 background checks for ammunition sales just like gun sales,” which would “stop  
 12 both from getting into the hands of dangerous individuals.” *Id.*

13 The Ammunition Laws also address the problem posed by ghost guns. People  
 14 prohibited from possessing firearms or ammunition can evade a background check  
 15 by acquiring a ghost gun, but might be stopped from buying ammunition for these  
 16 weapons because of the background check the Ammunition Laws require.

### 17 CONCLUSION

18 For the foregoing reasons, and for the reasons given in the Attorney General’s  
 19 prior briefing in this matter and on appeal, Plaintiffs’ Second Amendment, dormant  
 20 Commerce Clause, and preemption claims fail as a matter of law.<sup>16</sup>

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 27 <sup>16</sup> If the Court is inclined to rule in Plaintiffs’ favor, the Attorney General  
 28 respectfully requests a stay of any judgment, at least for a sufficient period to allow  
 him to seek a stay from the Ninth Circuit.

1 Dated: February 10, 2023

Respectfully submitted,

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