

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11

12 KIM RHODE, et al.,
13 Plaintiffs,

14 v.

15 ROB BONTA, in his official capacity as
16 Attorney General of the State of
17 California,

18 Defendant.
19

Case No.: 18-cv-802-BEN (JLB)

DECISION

20 **I. INTRODUCTION**

21 In 2016, California voters approved a statewide ballot measure known as
22 Proposition 63. Proposition 63 created a background check system for the purchasing of
23 ammunition. The voters approved a system where gun owners would apply for an
24 ammunition purchase permit. The permit would cost \$50 and it would be good for four
25 years. The permit would be renewable and revocable upon a disqualifying event. Under
26 the Proposition 63 approach, when a gun owner wanted to purchase ammunition, he
27
28

1 would submit his ammunition purchase permit to a licensed vendor and the permit would
 2 be checked with the State for current validity.¹

3
 4
 5
 6 ¹ Proposition 63 (November 8, 2016), Article 4, Ammunition Purchase
 Authorizations provided, *inter alia*,

7 30370. (a) (1) Commencing on January 1, 2019, any person who is 18 years of age
 8 or older may apply to the Department of Justice for an ammunition purchase
 authorization.

9 (2) The ammunition purchase authorization may be used by the authorized person
 10 to purchase or otherwise seek the transfer of ownership of ammunition from an
 11 ammunition vendor, as that term is defined in Section 16151, and shall have no other
 force or effect.

12 (3) The ammunition purchase authorization shall be valid for four years from July
 1, 2019, or the date of issuance, whichever is later, unless it is revoked by the department
 13 pursuant to subdivision (b).

14 (b) The ammunition purchase authorization shall be promptly revoked by the
 15 department upon the occurrence of any event which would have disqualified the holder
 16 from being issued the ammunition purchase authorization pursuant to this section. If an
 17 authorization is revoked, the department shall upon the written request of the holder state
 the reasons for doing so and provide the holder an appeal process to challenge that
 revocation.

18 (c) The department shall create and maintain an internal centralized list of all
 19 persons who are authorized to purchase ammunition and shall promptly remove from the
 20 list any persons whose authorization was revoked by the department pursuant to this
 21 section. The department shall provide access to the list by ammunition vendors for
 purposes of conducting ammunition sales or other transfers, and shall provide access to
 the list by law enforcement agencies for law enforcement purposes.

22 (d) The department shall issue an ammunition purchase authorization to the
 applicant if all of the following conditions are met:

23 (1) The applicant is 18 years of age or older.

24 (2) The applicant is not prohibited from acquiring or possessing ammunition under
 subdivision (a) of Section 30305 or federal law.

25 (3) The applicant pays the fees set forth in subdivision (g).

26 (e) (1) Upon receipt of an initial or renewal application, the department shall
 27 examine its records, and the records it is authorized to request from the State Department
 of State Hospitals, pursuant to Section 8104 of the Welfare and Institutions Code, and if
 28 authorized, the National Instant Criminal Background Check System, as described in
 Section 922(t) of Title 18 of the United States Code, in order to determine if the applicant

1 However, before election day the state legislature enacted Senate Bill 1235.
 2 Senate Bill 1235 “prospectively amended” aspects of Proposition 63 -- including the
 3 ammunition purchase permit program. Instead of creating a system using an ammunition
 4 purchase permit that was valid for four years, Senate Bill 1235 requires residents to
 5 submit to an automated background check every time they need to buy ammunition.²
 6 The new requirement went into effect on July 1, 2019. It is Senate Bill 1235’s
 7 requirement of a background check *for every purchase* that is challenged here. Why the

8 _____
 9
 10 is prohibited from possessing or acquiring ammunition under subdivision (a) of Section
 30305 or federal law.

11 (2) The applicant shall be approved or denied within 30 days of the date of the
 12 submission of the application to the department. If the application is denied, the
 13 department shall state the reasons for doing so and provide the applicant an appeal
 process to challenge that denial.

14 (3) If the department is unable to ascertain the final disposition of the application
 15 within 30 days of the applicant’s submission, the department shall grant authorization to
 the applicant.

16 (4) The ammunition purchase authorization number shall be the same as the
 number on the document presented by the person as bona fide evidence of identity.

17 (f) The department shall renew a person’s ammunition purchase authorization
 18 before its expiration, provided that the department determines that the person is not
 19 prohibited from acquiring or possessing ammunition under subdivision (a) of Section
 30305 or federal law, and provided the applicant timely pays the renewal fee set forth in
 subdivision (g).

20 (g) The department may charge a reasonable fee not to exceed fifty dollars (\$50)
 21 per person for the issuance of an ammunition purchase authorization or the issuance of a
 22 renewal authorization, however, the department shall not set these fees any higher than
 23 necessary to recover the reasonable, estimated costs to fund the ammunition authorization
 program provided for in this section and Section 30352, including the enforcement of this
 program and maintenance of any data systems associated with this program.

24 ² The resulting “pre-amendments” by Senate Bill 1235 created a curious and
 25 complicated patchwork quilt of new Penal Code provisions covering ammunition sales,
 26 purchases, and background checks. Some provisions spring from SB 1235; others flow
 27 from Proposition 63. Senate Bill 1235 §19(a) anticipated the passage of Proposition 63
 with the following language: “. . . if the Safety for All Act of 2016 is enacted by the
 28 voters at the November 8, 2016, statewide general election and becomes effective . . .
 Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, and 14 shall not become operative.”

1 legislature eliminated the voter-approved 4-year permit system in favor of an every-
2 purchase background check scheme is not apparent.³ Without prejudging the discarded
3 4-year permit system envisioned by the voters of California, such a system would clearly
4 be a more reasonable constitutional approach than the current scheme.

5 Today, a person may choose to submit to a full credit check to buy an automobile.
6 But he is not required to pass the same credit check every time he needs to refill his car
7 with gas or recharge his battery at a charging station. And the Constitution does not
8 mention a right to own automobiles (or carriages or horses). Similarly, when a person
9 chooses to buy a firearm, he is required to undergo a full background check. However,
10 until now, he was not required to also go through a background check every time he
11 needs to refill his gun with ammunition. And the Bill of Rights commands that the right
12 to keep and bear arms shall not be infringed. With the recently enacted ammunition
13 background check laws, gun owners in California undergo background checks more than
14 one million times each year simply to buy ammunition. They are not allowed to buy
15 ammunition from out-of-state vendors and have it delivered to their homes. They are not
16 allowed to buy ammunition in Arizona or Nevada and bring it with them back into
17 California. Though they are citizens entitled to enjoy all of the constitutional rights,
18 Californians are denied the Second Amendment right to buy ammunition for self-defense
19 at least 11% of the time because of problems with the background check system.

20 In earlier proceedings, this Court found the background check and anti-importation
21 provisions likely violate both the Second Amendment and the dormant Commerce Clause
22 and entered a preliminary injunction. *See Rhode v. Becerra*, 445 F. Supp. 3d 902 (S.D.
23 Cal. 2020). That Order was appealed. The Court of Appeals remanded the case for
24 _____

25
26 ³ The text of SB 1235 does not state the reason or offer a justification for the
27 change. For many years, ammunition control has been unsuccessfully proposed as a
28 more effective approach for gun control. *See e.g.*, Brendan J. Healey, *Plugging the Bullet
Holes in U.S. Gun Law: An Ammunition-Based Proposal for Tightening Gun Control*, 32
J. Marshall L. Rev. 1 (1998).

1 further proceedings consistent with *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*,
2 597 U.S. 1 (2022).⁴ After remand and pursuant to F.R.C.P. 65(a)(2), the Court
3 consolidated a hearing on the renewed motion for preliminary injunction with a trial on
4 the merits.

5 II. THE CHALLENGED STATE LAW PROVISIONS

6 Ammunition sales in California must now be conducted by a state-licensed
7 ammunition vendor in a face-to-face transaction. Cal. Penal Code § 30312(a)-(b). A
8 California resident who seeks to buy firearm ammunition must first pay for and pass an
9 electronic background check each time he or she wishes to make a purchase. The buyer
10 must prove he is a Citizen of the United States and a California resident in order to
11 submit to the background check. The background check must report that the buyer is not
12 a prohibited person, or more specifically, that the buyer is an “authorized” person. Cal.
13 Penal Code § 30370. In the language of the statute, to buy ammunition one must be: “A
14 person authorized to purchase ammunition pursuant to Section 30370.” Cal Penal Code §
15 30352(c)(1). “[T]he ammunition vendor shall verify with the department, in a manner
16 prescribed by the department, that the person is authorized to purchase ammunition. If
17 the person is not listed as an authorized ammunition purchaser, the vendor shall deny the
18 sale or transfer.” Cal. Penal Code § 30352(d).

19 The law provides an exception for ammunition purchased at a commercial target
20 range, but the ammunition must not leave the range. Cal. Penal Code § 30312(c)(9).
21 There is also an exception for purchasing ammunition from a spouse, registered domestic
22 partner, or immediate family member. Cal. Penal Code § 30312(c)(10). However,
23 without a spouse, partner, or family member to buy from, there is nowhere else in
24
25
26
27

28 ⁴ Appeal No. 20-55437, Order (filed Nov. 17, 2022).

1 California one may go to buy ammunition for defense of self, defense of family, defense
2 of property, use in a militia, hunting, or recreational shooting.⁵

3 A person who needs to buy ammunition has four paths to seek authorization: two
4 types of background checks, a certificate of eligibility verification check, and a firearm
5 purchase check. Today, the cost of submitting to a background check varies between \$1
6 for the “standard check” and \$19 for the “basic check.” The certificate of eligibility
7 verification check requires first obtaining a current certificate of eligibility which
8 demands one go through a time-consuming and expensive process. The fees for a firearm
9 purchase check (and any ammunition at the same time) are currently \$37.19.⁶ Whichever
10 path is taken, the background check cost is the same to buy one round or one thousand
11 rounds. A person in California may not purchase from vendors outside of California
12 unless the ammunition is delivered directly to an in-state, California-licensed ammunition
13 vendor, whereupon the buyer must then pass the background check in a face-to-face
14 transaction. *See* Cal. Penal Code §§ 30312, 30314, 30370, and 30385. All of this was
15 described in detail in the earlier Order.

16 **III. THE PLAINTIFFS’ CONTINUING ARTICLE III STANDING**

17 This Court previously found that Plaintiffs had Article III standing at the outset of
18 this case. Defendant continues to challenge the plaintiffs’ Article III standing. Now that
19 all of the evidence has been received,⁷ Plaintiffs’ standing may be considered again. “To
20 satisfy Article III standing, a plaintiff must show: (1) an injury in fact that is concrete and
21 particularized and actual or imminent, not conjectural or hypothetical; (2) a causal
22 connection between the injury and the challenged action of the defendant; and (3) that it
23

24
25 ⁵ There are the usual exceptions for law enforcement officers. *See* Cal. Penal Code
26 §§ 30312, 30314.

27 ⁶ The fees include the Dealer’s Record of Sale Fee of \$31.19, the Firearm Safety
28 Fee of \$1, and the Firearms Safety Enforcement Fee of \$5.

⁷ *See e.g.*, Declarations of Plaintiffs gathered in Plaintiffs’ Resp. to Order Entered
on July 18, 2023, Dkt. 93.

is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Teter v. Lopez*, 76 F.4th 938, 943 (9th Cir. 2023) (quoting *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (cleaned up)). Under this standard, which is the same standard applied previously, Plaintiffs have proven that they continue to suffer injuries in fact that are actual and ongoing, that the injuries are directly traceable to the Defendant who is the official responsible for enforcement of the ammunition laws and that the injuries would be redressed by an injunction against enforcement – a remedy this court can provide. Therefore, Plaintiffs continue to have Article III standing.

IV. DISCUSSION

Plaintiffs claim the ammunition background check laws are invalid for three main reasons. *First*, the ammunition background check scheme violates the Second Amendment to the U.S. Constitution. *Second*, the anti-importation aspect of the ammunition laws violates the Article 1, § 8, clause 3 of the Constitution, known as the dormant Commerce Clause. *Third*, the anti-importation provision for individuals is preempted by 18 U.S.C. § 926A. This Court agrees.

A. The Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. U.S. Const. amend. II.

In the earlier Order, it was determined that the state background check laws were likely to violate Second Amendment rights because they failed the multi-step intermediate scrutiny test adopted after *District of Columbia v. Heller*, 554 U. S. 570 (2008) and *McDonald v. Chicago*, 561 U. S. 742 (2010) in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). In *Bruen*, the Supreme Court rejected the old approach of using different levels of scrutiny, holding instead that,

when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest.

1 Rather, the government must demonstrate that the regulation is
 2 consistent with this Nation’s historical tradition of firearm
 3 regulation. Only if a firearm regulation is consistent with this
 4 Nation’s historical tradition may a court conclude that the
 5 individual’s conduct falls outside the Second Amendment’s
 6 “unqualified command.”

7 597 U.S. at 17 (cleaned up). Applying *Bruen*’s new lesson, this Court’s conclusion
 8 remains the same: the California ammunition background check laws violate a citizen’s
 9 right to bear arms. Once it becomes clear that acquiring ammunition is conduct covered
 10 by the plain text of the Second Amendment, it should be no surprise to discover that the
 11 government is *unable* to do that which it must now do: demonstrate that California’s first-
 12 of-its-kind sweeping statewide restriction on buying firearm ammunition is consistent
 13 with this Nation’s historical tradition of firearm regulation. Because these laws are not
 14 consistent with the Nation’s history and tradition, they must yield to the Constitution.

15 All agree that the ammunition necessary to use a gun is covered by the Second
 16 Amendment’s protection for keeping and bearing arms. The Attorney General correctly
 17 concedes that, “[e]ven though the Second Amendment does not reference a right to
 18 acquire or purchase Arms or mention ammunition, it ‘protects ancillary rights necessary
 19 to the realization of the core right to possess a firearm for self-defense.’”⁸ The Attorney
 20 General agrees that the core right to possess a firearm for self-defense, “would include a
 21 ‘corresponding right’ to ‘obtain bullets necessary to use’ firearms for self-defense.”⁹
 22 *Teixeira* makes it perfectly clear. “We recognized in *Jackson* that, although the Second
 23 Amendment ‘does not explicitly protect ammunition . . . , without bullets, the right to
 24 bear arms would be meaningless.’ *Jackson* thus held that ‘the right to possess firearms
 25 for protection implies a corresponding right’ to obtain the bullets necessary to use them.”

26 ⁸ Def.’s Omnibus Brief, Dkt. 103 at 3-4 (quoting *Teixeira v. County of Alameda*,
 27 873 F.3d 670, 677 (9th Cir. 2017)).

28 ⁹ *Id.* at 4 (quoting *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967
 (9th Cir. 2014)).

1 *Teixeira*, 873 F.3d at 677. This is the historically traditional view. *Teixeira* pointed out
 2 that only three years after the Fourteenth Amendment was adopted, “[t]he Tennessee
 3 Supreme Court cogently observed in 1871, interpreting that state’s constitution, that ‘the
 4 right to keep arms, necessarily involves the right to purchase them, to keep them in a state
 5 of efficiency for use, *and to purchase and provide ammunition suitable for such arms,*
 6 *and to keep them in repair.’* *Teixeira*, 873 F.3d at, 678 (quoting *Andrews v. State*, 50
 7 Tenn. (3 Heisk.) 165, 178 (1871)) (emphasis added). After all, and as *Jackson* observed,
 8 “[a] regulation eliminating a person’s ability to obtain or use ammunition could thereby
 9 make it impossible to use firearms for their core purpose,” and “*Heller* did not
 10 differentiate between regulations governing ammunition and regulations governing the
 11 firearms themselves.” *Jackson*, 746 F.3d at 967. Plaintiffs assert that this is enough to
 12 shift the burden to the government to demonstrate a history and tradition of ammunition
 13 background checks.

14 In contrast, the Attorney General makes two arguments to end the case here, at the
 15 textual level, before he has to shoulder the burden of demonstrating a history and
 16 tradition of constitutional ammunition background checks. First, he retreats and says that
 17 purchasing ammunition without a background check is not *really* covered by the plain
 18 text of the Second Amendment or any ancillary right.¹⁰ Second, he says that the
 19 background check laws are simply “presumptively lawful regulatory measures.”¹¹
 20 Neither argument is persuasive. The first argument employs a rhetorical device to over-
 21 describe in detail the asserted constitutional wrong. Having over-described the alleged
 22 constitutional right, it is then argued that the detailed description of the asserted right is
 23 not covered by the plain text of the Constitution. This is an example:

24 Here, Plaintiffs wish to purchase ammunition without passing a
 25 background check. They also wish to purchase ammunition
 26 without having to complete a face-to-face transaction at a

27 ¹⁰ *Id.*

28 ¹¹ *Id.* at 4-7.

1 licensed firearms dealer, and without the dealer retaining
2 records of the transaction. This conduct is not covered by the
3 plain text of the Second Amendment.¹²

4 The flaw in this approach is that it focuses on the details of the constitutional
5 wrong and then asserts that these details are not covered by the text of the Constitution.
6 For example, suppose a plaintiff described the wrong like this: having been threatened
7 by lawless rioting two blocks from home and with more threatened violence anticipated,
8 plaintiff desires to buy ammunition for his firearm today so as to be able to defend
9 himself and his household tonight, but is unable to do so because the background check
10 system erroneously reports that he is not an authorized purchaser. The government
11 would then say that the wrong, as described, is not covered by the plain text of the
12 Second Amendment. But all a plaintiff needs to allege is that by preventing him from
13 buying ammunition, the government's background check system infringed his right to
14 bear arms for self-defense. That is what is done here. For example, the Plaintiffs allege
15 that "[f]or those who do not have access to a nearby ammunition vendor or FFL, Section
16 30312 bans and criminalizes the only method by which those affected persons can obtain
17 ammunition for self-defense."¹³ The Court finds that Plaintiffs' allegations of
18 constitutional wrong are covered by the plain text.

19 The Attorney General's second argument relies on an old justification while at the
20 same time avoiding *Jackson*. He points out that the Supreme Court presumes that
21 conditions and qualifications on the commercial sale of arms are lawful, citing *Heller*,
22 554 U.S. at 626-27 & n.26 ("[N]othing in our opinion should be taken to cast doubt on
23 longstanding prohibitions and . . . laws imposing conditions and qualifications on the
24 commercial sale of arms."). The Attorney General then claims that the ammunition
25
26

27 ¹² Def.'s Brief in Resp. to the Court's Order, Dkt. 81 at 16

28 ¹³ Amended Complaint, Dkt. 9 at ¶94 (Second Claim for Relief).

1 background check laws are no more than “conditions and qualifications on the
2 commercial” buying of ammunition that are presumptively lawful.

3 *Heller* did not decide that conditions and qualifications on the commercial buying
4 of ammunition -- erected and stacked to the extent that would-be lawful purchasers are
5 delayed and denied -- would be presumptively lawful. *Heller* did not say that every
6 condition or qualification a government could impose on buying a firearm or ammunition
7 is beyond constitutional review. *Heller* answered a different question holding that the
8 Second Amendment protects an individual right and that a complete prohibition on
9 possession of a handgun and requiring the inoperability of a gun in the home violates the
10 Second Amendment. *Id.* at 635. When *Heller* was decided, no state in the nation had
11 ever required a background check for ammunition.

12 Whatever firearm regulations may be thought of as presumptively lawful under
13 *Heller*, ammunition regulations are not among them. This is not a question of first
14 impression. It was already decided in *Jackson*. *Jackson* said unambiguously that,
15 “*Heller* does not include ammunition regulations in the list of ‘presumptively lawful’
16 regulations.” 746 F.3d at 968. And *Jackson* said, “[c]onducting our historical review, we
17 conclude that prohibitions on the sale of ammunition do not fall outside ‘the historical
18 understanding of the scope of the Second Amendment right.’” *Id.* (quoting *Heller*, 554
19 U.S. at 625).

20 Because ammunition sale prohibitions and regulations are covered by the Second
21 Amendment, the presumption is that such restrictions are infringements. The State may
22 overcome the presumption, but it needs to do so as *Bruen* teaches. In other words, “the
23 government must demonstrate that the regulation is consistent with this Nation’s
24 historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 17; *Atkinson v. Garland*, 70
25 F.4th 1018, 1020 (7th Cir. 2023) (“Accordingly, when the Second Amendment’s ‘plain
26 text’ covers the regulated conduct, the government has only one way to defend the
27 regulation—by proving that it is ‘consistent with this Nation’s historical tradition of
28 firearm regulation.’”).

1 The Attorney General also relies on a footnote in *Bruen* to argue that background
2 checks are permissible. *Bruen*'s footnote nine says:

3 To be clear, nothing in our analysis should be interpreted to
4 suggest the unconstitutionality of the 43 States' "shall-issue"
5 licensing regimes, under which "a general desire for self-
6 defense is sufficient to obtain a permit." Because these
7 licensing regimes do not require applicants to show an atypical
8 need for armed self-defense, they do not necessarily prevent
9 "law-abiding, responsible citizens" from exercising their
10 Second Amendment right to public carry. Rather, it appears
11 that these shall-issue regimes, which often require applicants to
12 undergo a background check or pass a firearms safety course,
13 are designed to ensure only that those bearing arms in the
14 jurisdiction are, in fact, "law-abiding, responsible citizens."
15 And they likewise appear to contain only "narrow, objective,
16 and definite standards" guiding licensing officials, rather than
17 requiring the "appraisal of facts, the exercise of judgment, and
18 the formation of an opinion,"—features that typify proper-cause
19 standards like New York's. That said, *because any permitting
20 scheme can be put toward abusive ends, we do not rule out
21 constitutional challenges to shall-issue regimes where, for
22 example, lengthy wait times in processing license applications
23 or exorbitant fees deny ordinary citizens their right to public
24 carry.*

18 597 U.S. at 38 and n.9 (citations omitted) (emphasis added). The Attorney General posits
19 that footnote nine provides constitutional approval of the background check laws. He
20 does not acknowledge that the California architecture may be that abusive permitting
21 scheme which footnote nine describes as constitutionally suspect: "regimes where, for
22 example, lengthy wait times in processing license applications or exorbitant fees deny
23 ordinary citizens their right to public carry." *Id.* This lawsuit is that constitutional
24 challenge to an ammunition purchase authorization regime where record data
25 mismatches, lengthy and occasionally infinite wait times, and sometimes exorbitant fees,
26 are currently denying ordinary citizens their right to public carry.
27
28

1 In the earlier Order, the cumbersome and byzantine background check system was
 2 described in detail and need not be repeated here. In 2019, the laws were new and the
 3 procedures and systems were being put in place for the first time. The evidence proved
 4 that during the first seven months of operation, 101,047 law-abiding gun owners who
 5 established their citizenship and underwent background checks were nevertheless
 6 rejected. The 2019 rejection rate was 16%. Overwhelmingly, the rejections were either
 7 because the state had no record of gun ownership or because of personal identifier
 8 mismatches. *Rhode*, 445 F. Supp. 3d at 917-918.

9 One would expect problems and errors in a new system as extensive and ungainly
 10 as California's unprecedented ammunition background check system. Unfortunately,
 11 today the background check rejection rate is lower at 11%, but it is still too high.¹⁴ In the
 12 first six months of 2023, there were 538,359 background checks. Of those, 58,087
 13 individuals were rejected because of a failure to match an AFS record.¹⁵ These are
 14 citizens with Second Amendment rights to protect themselves who were blocked from
 15 buying ammunition. The Attorney General says that technical rejections are fixable.
 16 Yet, evidencing the difficulty of overcoming system rejections, of the 7,342 people who
 17 were rejected by a Standard background check in January of last year, 2,722 individuals
 18 (37%) had still not successfully purchased ammunition six months later.¹⁶ Some have
 19 likely given up trying.¹⁷

22 ¹⁴ Even those who have gone through the complicated and time-consuming process
 23 of obtaining a current California Certificate of Eligibility were rejected 9% of the time.
 24 *See* Fifth Supplemental Declaration of Morales, Dkt. 92-11 at ¶53.

25 ¹⁵ Three reasons for rejections (address mismatches; no apparent AFS record; name
 26 mismatches) accounted for about 85% of all rejections in 2023. *See* Fifth Supplemental
 Declaration of Morales, Dkt. 92-11 at ¶27.

27 ¹⁶ *See* Fifth Supplemental Declaration of Morales, Dkt. 92-11 at ¶31.

28 ¹⁷ The State estimated (before the laws were implemented) that there would be
 thirteen million ammunition background checks per year. Since then, there has been
 something closer to only one million background checks each year. One explanation

Ostensibly, the entire reason for the implementation of California's sweeping ammunition purchase background check is to prevent dangerous prohibited persons from acquiring bullets for their guns. Of those same 583,359 persons who submitted to ammunition background checks in the first half of 2023, only .03% (141 individuals) were denied because they were found on the Armed Prohibited Person System list.¹⁸ The Court asked the Attorney General to provide information about the ultimate resolution of cases where persons who wanted to buy ammunition were reported to be prohibited persons. Special Agent Sidney Jones¹⁹ provided case dispositions for prohibited persons denied the purchase of ammunition between July 1, 2019 and January 31, 2020.²⁰ During those seven months, 770 ammunition buyers were rejected as prohibited persons.²¹ At least sixteen of the 770 persons rejected were later determined to have been incorrectly identified as prohibited persons and should have been authorized to purchase ammunition. *See Rhode*, 445 F. Supp. 3d at 924. Agent Jones states that those 770 background check rejections prompted 51 investigations that resulted in firearms, magazines, or ammunition seizures.²² From those 51 investigations, 15 individuals were arrested.²³ In the end, the government obtained four felony and two misdemeanor convictions.²⁴ To sum up, approximately 635,000 residents were required to undergo background checks in the last half of 2019, the denials of which prompted the arrests of 15 individuals which led to six criminal convictions.

could be that the onerous and inescapable burden of the present system are chilling the rights of law-abiding gun owners. *See Rhode*, 445 F. Supp. 3d at 924 and nn.27 and 28.

¹⁸ *See* Fifth Supplemental Declaration of Morales, Dkt. 92-11 at ¶11.

¹⁹ Special Agent in Charge for the California Department of Justice, Bureau of Firearms.

²⁰ *See* Declaration of Sidney Jones, Dkt. 92-12 at ¶22.

²¹ *See* Third Supp. Morales Declaration, Dkt. 53, at ¶6.

²² *See* Declaration of Sidney Jones, Dkt. 92-12 at ¶27.

²³ *Id.* at ¶28.

²⁴ *Id.* at ¶28. Jones notes the disposition of the majority of charges is unknown to him and some cases may still be ongoing.

1 In the first half of last year, 589,087 individuals traveled to an ammunition vendor
 2 to buy ammunition. They proved their citizenship and residency with identification
 3 documents and paid for a background check. The State's computers rejected 58,087 or
 4 11% of them. This is an average of 322 individuals rejected every day. How many of
 5 the 58,087 needed ammunition to defend themselves against an impending criminal threat
 6 and how many were simply preparing for a sporting event, we will never know. What is
 7 known is that in almost all cases, the 322 individuals that are rejected each day are being
 8 denied permission to freely exercise their Second Amendment right -- a right which our
 9 Founders instructed shall not be infringed.

10 The Fifteenth Amendment directs that the right to vote shall not be denied or
 11 abridged. A state law requiring identification before voting, where 4.5% of all voters
 12 lacked the requisite identification documents to vote, was struck down because the
 13 excessive burden abridged the constitutional right, and more specifically for violating the
 14 Voting Rights Act (legislation that flows from the Fifteenth Amendment).²⁵ If a state
 15 identification requirement for voting which burdens 4.5% of registered voters is an
 16

17
 18 ²⁵ See *Veasey v. Abbott*, 830 F.3d 216, 250 (5th Cir. 2016), *cert. denied*, 580 U.S.
 19 1104 (2017) ("The district court found that 608,470 registered voters, or 4.5% of all
 20 registered voters in Texas, lack SB 14 ID."). The *Veasey* court noted the kinds of
 21 burdens for obtaining identification documents to vote. They are the same kinds of
 22 burdens that Plaintiffs face in this case in order to be eligible for the ammunition
 23 background check. *Id.* at 254 ("The district court found that 'the Plaintiffs demonstrated
 24 the impact' of SB 14 along several axes, including: (1) the difficulty of obtaining an EIC
 25 and voting with the proper ID because of Texas's poor implementation of this program;
 26 (2) the cost of underlying documents necessary to obtain an EIC or other SB 14 ID; (3)
 27 difficulties with delayed, nonexistent, out-of-state, or amended birth certificates due to
 28 nontraditional births and errors on birth certificates; (4) long distances and other travel
 issues that made getting to a registrar and DPS office problematic for many Plaintiffs; (5)
 a strict disability exemption; and (6) a burdensome alternative of voting absentee. Some
 of the Plaintiffs faced difficulties along multiple axes in attempting to get SB 14 ID and
 vote in person.").

1 unconstitutional burden on the Fifteenth Amendment, surely a state identification
 2 requirement that blocks an untold number of gun owners from undergoing an ammunition
 3 background check and then rejects 11% of those who are checked, is likewise an
 4 unconstitutional burden on the Second Amendment. “The constitutional right to bear
 5 arms in public for self-defense is not ‘a second-class right, subject to an entirely different
 6 body of rules than the other Bill of Rights guarantees.’” *Bruen*, 597 U.S. at 70 (quoting
 7 *McDonald*, 561 U.S. at 780).

8 If any background check system satisfies *Bruen*’s footnote nine description of a
 9 scheme put to abusive ends, as opposed to the system originally approved by the voters,
 10 this may be it. In other words, assuming *arguendo* that there is a presumption in favor of
 11 a background check condition or qualification on the buying of ammunition, the
 12 presumption has been overcome. Consequently, the burden is now on the government to
 13 demonstrate a history and tradition of regulation similar to the ammunition background
 14 check laws challenged here.

15 **1. History and Tradition of Background Checks**

16 For conducting the historical inquiry, *Bruen* identifies a number of guidelines. The
 17 first, and perhaps the most important for this case, is that “when a challenged regulation
 18 addresses a general societal problem that has persisted since the 18th century, the lack of
 19 a distinctly similar historical regulation addressing that problem is relevant evidence that
 20 the challenged regulation is inconsistent with the Second Amendment.” *Bruen*, 597 U.S.
 21 at 26. Also, “if earlier generations addressed the societal problem, but did so through
 22 materially different means, that also could be evidence that a modern regulation is
 23 unconstitutional.” *Id.* at 26-27. “[C]ases implicating unprecedented societal concerns or
 24 dramatic technological changes may require a more nuanced approach,” and analogical
 25 reasoning. *Id.* at 27. “Determining whether a historical regulation is a proper analogue
 26 for a distinctly modern firearm regulation requires a determination of whether the two
 27 regulations are ‘relevantly similar.’” *Id.* at 28-29. *Bruen* notes,

28 analogical reasoning under the Second Amendment is neither a

1 regulatory straitjacket nor a regulatory blank check. On the one
 2 hand, courts should not “uphold every modern law that
 3 remotely resembles a historical analogue,” because doing so
 4 “risks endorsing outliers that our ancestors would never have
 5 accepted.” On the other hand, analogical reasoning requires
 6 only that the government identify a well-established and
 7 representative historical analogue, not a historical twin. So
 8 even if a modern-day regulation is not a dead ringer for
 9 historical precursors, it still may be analogous enough to pass
 10 constitutional muster.

11 *Id.* at 30.

12 2. 1791 to 1868

13 *Bruen* teaches the most significant historical evidence comes from the years 1791
 14 to 1868 with emphasis placed on the earlier time period. *Id.* at 34-38. *Bruen* says, “[T]he
 15 scope of the protection applicable to the Federal Government and States is pegged to the
 16 public understanding of the right when the Bill of Rights was adopted in 1791.” *Id.* at 37.
 17 Among those, courts afford greater weight to historical analogues more contemporaneous
 18 to the Second Amendment’s ratification. *United States v. Rahimi*, 61 F.4th 443, 456 (5th
 19 Cir. 2023), *cert granted*, 143 S. Ct. 2688 (2023). British sources pre-dating the
 20 Constitution are not particularly instructive because the American Revolution was a
 21 rejection of British rule. Sources post-enactment are also less helpful. *Bruen*, 597 U.S. at
 22 36 (“Similarly, we must also guard against giving postenactment history more weight
 23 than it can rightly bear.”). “[T]o the extent later history contradicts what the text says,
 24 the text controls Thus, post-ratification adoption or acceptance of laws that are
 25 inconsistent with the original meaning of the constitutional text obviously cannot
 26 overcome or alter that text.” *Id.* (citations omitted) (cleaned up). Late nineteenth century
 27 evidence is not particularly instructive: “because post-Civil War discussions of the right
 28 to keep and bear arms ‘took place 75 years after the ratification of the Second
 Amendment, they do not provide as much insight into its original meaning as earlier
 sources.’” *Id.* (quoting *Heller*, 554 U.S. at 614).

1 There is little reason to rely on laws from the later part of the 1800's or the 1900's
 2 rather than ones put into effect at the time of the founding. *See Worth v. Harrington*, No.
 3 21-CV-1348 (KMM/LIB), 2023 WL 2745673, at *12 (D. Minn. Mar. 31, 2023) (“But the
 4 Commissioner offers no persuasive reason why this Court should rely upon laws from the
 5 second half of the nineteenth century to the exclusion of those in effect at the time of the
 6 founding in light of *Bruen*’s warnings not to give post-Civil War history more weight
 7 than it can rightly bear.”); *Firearms Policy Coalition, Inc. v. McCraw*, No. 4:21-CV-
 8 1245-P, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022); *United States v. Harrison*,
 9 No. CR-22-00328-PRW, 2023 WL 1771138, at *8 (W.D. Okla. Feb. 3, 2023) (quoting
 10 *Bruen*, 597 U.S. at 83 (Barrett, J., concurring) “[T]oday’s decision should not be
 11 understood to endorse freewheeling reliance on historical practice from the mid-to-late
 12 19th century to establish the original meaning of the Bill of Rights.”); *but see Hanson v.*
 13 *D.C.*, No. CV 22-2256 (RC), 2023 WL 3019777, at *16 (D.D.C. Apr. 20, 2023) (“In this
 14 case, it is appropriate to apply 20th century history to the regulation at issue.”).

15 **3. The State’s List of Relevant Laws**

16 Because it is the government’s burden to justify its laws with a national “historical
 17 tradition of firearm regulation,” the State was directed to create a list of relevant laws
 18 regulating arms dating from the time of the Second Amendment to twenty years after the
 19 Fourteenth Amendment. The State went far beyond. The State produced a list of 148
 20 laws covering 535 years -- from 1403 to 1938.²⁶ Many of the entries are not particularly
 21 relevant because they came much earlier, or much later than the most significant time
 22 period of 1791-1868. The first 54 laws by the Attorney General pre-date the adoption of
 23 the Second Amendment. The last 40 laws on the list post-date the adoption of the
 24 Fourteenth Amendment; 38 of the 40 post-Fourteenth Amendment laws date from the
 25 twentieth century.

26
 27
 28 ²⁶ *See* Def.’s Survey of Relevant Statutes, Dkt. 79, Exhibit 1 & 2 (citations to these
 entries herein are indicated by brackets [--]).

4. No Historical Twins; No Dead Ringers

The Attorney General has put together a list of 50 laws dating from the most important historical time period. Among these 50 are 15 territorial regulations which are not particularly helpful in establishing a tradition.²⁷ There are no historical twins and no dead ringers among the State's 50. The Attorney General has not identified a single historical law that required a citizen to pass a background check in order to purchase ammunition. Citizens were free in every state to buy ammunition at any time and without qualification.

Certainly, since the Founding, some citizens were dangerous and presented a risk of armed violence to others. To borrow Plaintiffs' words, "[t]here may be some things new under the sun, but the commercial availability of ammunition and the risk that dangerous individuals might avail themselves of it is not one of them."²⁸ The Attorney

²⁷ *Bruen* has already considered such territorial regulations and found that they are not particularly helpful. "First, the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition" *Bruen*, 597 U.S. at 67. "These territorial 'legislative improvisations,' which conflict with the Nation's earlier approach to firearm regulation, are most unlikely to reflect 'the origins and continuing significance of the Second Amendment' and we do not consider them 'instructive.'" *Id.* (quoting *Heller*, 554 U.S. at 614). "Second, because these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality." *Id.* at 68. "[W]e fail to see how they inform 'the origins and continuing significance of the Amendment.'" *Id.* (quoting *Heller*, 554 U.S. at 592). "Finally, these territorial restrictions deserve little weight because they were — consistent with the transitory nature of territorial government — short lived Thus, they appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation." *Id.* at 69 (citations omitted). One commentator disagrees and argues that territorial regulations should enjoy more Second Amendment significance because they were adopted with consideration for the Bill of Rights. *See Andrew Willinger, The Territories Under Text, History, and Tradition* (2023), (<https://ssrn.com/abstract=4372185>). Even so, they suggest an absence regulation on buying ammunition during the most important historical period.

²⁸ Plaintiffs' Response to Def.'s Brief, Dkt. 85 at 5.

1 General has not identified a historical law that required every citizen, as California's laws
 2 do, to receive permission before buying ammunition. No such tradition has been
 3 established or suggested. States could have addressed the problem of dangerous armed
 4 citizens in this way, but they did not. Based on the historical record prepared by the
 5 Attorney General, when states addressed the concern at all, they addressed it by later
 6 seizing firearms from the individual rather than preventing ahead of time the acquisition
 7 of ammunition by all individuals.

8 The Attorney General asks to be excused from identifying historical laws similar to
 9 the laws challenged here because of the internet and ghost guns.²⁹ The internet and
 10 computers have made it possible to run rapid background checks. So, the type of
 11 background check now required by the ammunition laws was not possible during the
 12 Founding or Reconstruction era. Because of the technological advancement, a more
 13 nuanced approach to the historical analysis is required, argues the Attorney General.

14 While the methods and means of running a background check have changed and
 15 improved, the flaw in the government's argument is that there are no historical laws that
 16 have been identified that required ammunition background checks by any means,
 17 however slow or imperfect they might have been. Background checks in some form must
 18 have been performed in the many nineteenth century cases where licenses were required
 19 for carrying concealed firearms.³⁰ As one court said of such nineteenth century firearm
 20 licensing schemes, "[t]here are a lot of them." *Antonyuk v. Chiumento*, 2023 U.S. App.
 21 LEXIS 32492, *80 (2nd Cir. Dec. 8, 2023) (collecting numerous firearm licensing
 22 schemes from the years immediately following ratification of the Fourteenth Amendment
 23 that authorized a local official to issue permits in his limited discretion). It is difficult to
 24

25 ²⁹ Def.'s Omnibus Brief, Dkt. 103 at 8 & n.5.

26 ³⁰ Even today, California state law delegates to local county sheriffs the task of
 27 conducting background checks on concealed carry applicants. *See* Cal. Penal Code §
 28 26150(a).

1 see how the existence of the internet requires the more nuanced approach of analogical
2 reasoning. Even if the advent of government database searching *via* the internet justified
3 a prohibited persons clearance check, such a check could be accomplished with the more
4 reasonable 4-year purchase permit card that the voters approved in Proposition 63.

5 Guns made without serial numbers, or “ghost guns” as the government refers to
6 them, have been in existence throughout the eighteenth and nineteenth centuries. *United*
7 *States v. Price*, 635 F. Supp. 3d 455, 464 (S.D. W.V. 2022) (“A firearm without a serial
8 number in 1791 was certainly not considered dangerous or unusual compared to other
9 firearms because serial numbers were not required or even commonly used at that
10 time.”). Until the mid-twentieth century, the requirement of a serial number on a firearm
11 was unknown. “Serial numbers were not broadly required for all firearms manufactured
12 and imported in the United States until the passage of the Gun Control Act of 1968.” *Id.*
13 at 462. Even if one argued that a prohibited person with a ghost gun could be blocked
14 with a background check, the check could be accomplished with the more reasonable
15 4-year purchase permit card that the voters approved in Proposition 63. While not
16 judging the ultimate constitutionality of an ammunition permit card approach, certainly
17 the 4-year ammunition permit system voted for by Californians would be a more
18 reasonable way of conducting background checks.

19 In the end, neither of these asserted technological advances justify using a more
20 nuanced approach of considering historical analogues. Quite the opposite. This is the
21 type of case *Bruen* contemplated when it said, “when a challenged regulation addresses a
22 general societal problem that has persisted since the 18th century, the lack of a distinctly
23 similar historical regulation addressing that problem is relevant evidence that the
24 challenged regulation is inconsistent with the Second Amendment.” *Bruen*, 597 U.S. at
25 26. Consequently, the absence of a distinctly similar historical ammunition background
26 check regime is evidence of its inconsistency with Second Amendment rights.

5. A More Nuanced Approach – Looking for Historical Analogues

The Attorney General asks for leeway to use the more nuanced approach of looking for relevant historical analogues, as described by *Bruen*. This Court is not persuaded that a more nuanced approach is justified. Nevertheless, it does not matter because neither has the Attorney General identified a relevant historical analogue. Instead, it points to twentieth century background check laws and says that they are lineal descendants of laws. According to the Attorney General, “Despite appearing in the 20th century, these restrictions and requirements are “‘lineal descendants’ of historical laws banning dangerous people from possessing guns.”³¹ The logic is opaque.

What are the 50 historical laws dating from 1789 to 1868 that the Attorney General has compiled as potential historical analogues? One would expect to find laws or ordinances that required a gunsmith to check with the local sheriff before selling a firearm. Or one might expect to find laws that restricted gunsmiths from selling to any customer who was a stranger in his community. Or perhaps there would be historical laws uncovered requiring a customer’s proof of citizenship before a merchant was allowed to sell him gunpowder. These could be apt analogues to demonstrate a related historical tradition of constitutional regulation.

Nothing like this appears in the State’s compilation of laws.

The State’s compilation lists 48 laws which made it a crime to possess a gun and ammunition by Negroes, Mulattos, slaves, or persons of color, and two laws that prohibited sales to Indians.³² For example, the Attorney General lists a 1798 Kentucky law which prohibited any “Negro, mulatto, or Indian” from possessing any gun or ammunition. [57] An 1846 North Carolina law offers another example wherein it was prohibited to sell or deliver firearms to “any slave.” [92] This is the third time the

³¹ Def.’s Brief in Resp., Dkt. 82 at 4 (quoting *Kanter v. Barr*, 919 F.3d 437, at 464 (7th Cir. 2019) (Barrett, J., dissenting)).

³² See Def.’s Survey of Relevant Statutes, Dkt. 79, Exhibit 1 & 2, [55] to [105].

1 Attorney General has cited these laws in support for its laws and restrictions implicating
 2 the Second Amendment. These fifty laws identified by the Attorney General constitute a
 3 long, embarrassing, disgusting, insidious, reprehensible list of examples of government
 4 tyranny towards our own people.³³

5 The government took a similar legal position before the Fifth Circuit Court of
 6 Appeals in *Rahimi*. That court found that such laws were not relevantly similar to the
 7 modern law at issue:

8 The Government next points to laws in several colonies and
 9 states that disarmed classes of people considered to be
 10 dangerous, specifically including those unwilling to take an
 11 oath of allegiance, slaves, and Native Americans. These laws
 12 disarmed people thought to pose a threat to the security of the
 13 state due to their perceived lack of loyalty or societal status.
 14 "While public safety was a concern, most disarmament efforts
 15 were meant to prevent armed rebellions. The early Americans
 16 adopted much of that tradition in the colonies."
 17 But we question at a threshold level whether colonial and state
 18 laws disarming categories of "disloyal" or "unacceptable"
 19 people present tenable analogues to § 922(g)(8). Laws that
 20 disarmed slaves, Native Americans, and disloyal people may
 21 well have been targeted at groups excluded from the political
 22 community—i.e., written out of "the people" altogether—as
 23 much as they were about curtailing violence or ensuring the
 24 security of the state. Their utility as historical analogues are
 25 therefore dubious, at best. In any event, these laws fail on
 26 substance as analogues to § 922(g)(8), because out of the gate,
 27 why they disarmed people was different. The purpose of laws
 28 disarming "disloyal" or "unacceptable" groups was ostensibly
 the preservation of political and social order, not the protection
 of an identified person from the threat of "domestic gun abuse,"
 posed by another individual. Thus, laws disarming "dangerous"

33 The Attorney General notes that "the listing of such racist and discriminatory statutes should in no way be construed as an endorsement of such laws by the Attorney General or his counsel in this matter." See Def.'s Survey of Relevant Statutes, Dkt. 79, Exhibit 1, n.2.

1 classes of people are not "relevantly similar" to § 922(g)(8)
 2 such that they can serve as historical analogues.

3 *United States v. Rahimi*, 61 F.4th 443, 456-57 (5th Cir. 2023), *cert granted*, 143 S. Ct.
 4 2688 (2023). Much the same can be said in this case. These laws that disarmed slaves
 5 and Indians were targeted at groups excluded from the political community — “i.e.,
 6 written out of ‘the people’ altogether.” At the time these laws existed, neither people of
 7 color, nor native Americans were considered citizens of the United States. So, it makes
 8 little sense to argue, as the Attorney General implicitly does, that historical restrictions
 9 placed on non-citizens, who were not accorded constitutional protections, now justify
 10 placing similar modern restrictions on citizens who do enjoy constitutional rights.³⁴

11 The Attorney General may complain that his list has 100 more laws to consider.
 12 They do not help his case. The 38 later laws that date from the twentieth century cannot
 13 confirm an earlier tradition of constitutional regulation that simply did not exist. The 54
 14 laws that predate the adoption of the Second Amendment are much of the same sort that
 15 come thereafter. They are restrictions on ammunition possession by slaves [17, 27, 28,
 16 29, 30, 31, 34, 36, 37, 38, 43, 44], negroes [6, 28, 29, 30, 31, 35, 36, 37], mulattos [28,
 17 29, 37], Indians [2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 16, 18, 21, 22, 23, 24, 29, 32, 33, 41,
 18 42, 46], Catholics [26, 40], Acadians [39], Dutch and Frenchmen [19]. For the same
 19 reasons stated earlier, these repugnant historical examples of prejudice and bigotry will
 20

21
 22 ³⁴ *C.f. Range v. A.G. United States*, 69 F.4th 96, 104-105 (3rd. Cir. 2023) (*en banc*)
 23 (“The Government’s attempt to identify older historical analogues also fails. The
 24 Government argues that ‘legislatures traditionally used status-based restrictions’ to disarm
 25 certain groups of people. Apart from the fact that those restrictions based on race and
 26 religion now would be unconstitutional under the First and Fourteenth Amendments, the
 27 Government does not successfully analogize those groups to Range and his individual
 28 circumstances. That Founding-era governments disarmed groups they distrusted like
 Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that
 Range is part of a similar group today. And any such analogy would be ‘far too
 broad.’”).

1 not be used to justify the State’s current infringement on the constitutional rights of
2 citizens.

3 Lastly, the Attorney General argues that its ammunition background check laws
4 have a historical analogue in loyalty oaths that were required for a short time by some of
5 the newly created United States.³⁵ At the time of the American war of independence,
6 there were newly formed states that required residents to declare their allegiance to the
7 new nation. For example, Pennsylvania gave itself the power to disarm any of its people
8 who were “disaffected to the liberty and independence” of the Commonwealth in 1779.
9 [52, 53] But such laws served to distinguish among the people within a new state. These
10 types of laws were necessary to differentiate between those who were willing to swear an
11 oath of allegiance to be part of the new nation and those who still considered themselves
12 subjects of King George with no interest in becoming new citizens. In essence,
13 individuals who refused to pledge their allegiance were considered non-citizens and
14 therefore would not enjoy the rights and privileges (or obligations) of a new citizen.
15 Disarming those loyal to the enemy was also a good military strategy.

16 Today, it makes little sense to argue that disarmament laws targeting non-citizens
17 who were not entitled to constitutional protections now justify placing similar modern
18 restrictions on citizens who do enjoy constitutional rights. Note that it is already
19 generally unlawful for a non-citizen to purchase or possess a firearm or ammunition.
20 Title 18 U.S.C. § 922(g)(5). *Heller* explained that “the people” as used in the
21 Constitution refers to all citizens. Because the Second Amendment right presumptively
22 belongs to all Americans, analogues to antiquated laws mistreating slaves and Native
23 Americans are improper analogues. *Range v. A.G. United States*, 69 F.4th 96, 101 (3rd.
24 Cir. 2023) (*en banc*) (“But *Heller* said more; it explained that ‘the people’ as used
25 throughout the Constitution ‘unambiguously refers to all members of the political
26

27
28 ³⁵ See Def.’s Omnibus Brief at 9.

community, not an unspecified subset.’ So, the Second Amendment right, *Heller* said, presumptively ‘belongs to all Americans.’”) (quoting *Heller*, 554 U.S. at 580-81).

The state’s ammunition background check regime turns that constitutional presumption the wrong way around. It treats all citizens as if they do not enjoy a right to buy ammunition. It forces Americans to entreat and supplicate the state for permission. Only when the State is satisfied that a citizen has proven that they meet the qualifications – only then – does the state issue its stamp of authorization. *See* Cal. Penal Code § 30352(d) (“[T]he ammunition vendor shall verify with the department, in a manner prescribed by the department, that the person is authorized to purchase ammunition.”). This is not the language of a right; this is the language of a government license or grant of a privilege.

In the end, the State has failed to carry its burden to demonstrate that the ammunition background check laws “are consistent with this Nation’s historical tradition of firearm regulation,” as required by *Bruen*. *Bruen* cautions, “courts should not ‘uphold every modern law that remotely resembles a historical analogue,’ because doing so ‘risks endorsing outliers that our ancestors would never have accepted.’” 597 U.S. at 30. A sweeping background check requirement imposed every time a citizen needs to buy ammunition is an outlier that our ancestors would have never accepted for a citizen. Therefore, California’s ammunition background check system laws are unconstitutional and shall not be enforced.

B. The Dormant Commerce Clause

Plaintiffs also claim that the anti-importation provisions of the ammunition laws, California Penal Code §§ 30312, 30314, 30370, and 30385, violate the dormant Commerce Clause because they favor businesses in California by erecting a barrier to ammunition sellers in other states. As this Court explained in its previous order, Article I, § 8, clause 3 of the Constitution, gives Congress the power “[t]o regulate commerce ... among the several states.” This affirmative grant of power to Congress includes a negative implication, which restricts the ability of states to regulate and interfere with

interstate commerce. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 571 (1997). That restriction upon the states, coined the dormant Commerce Clause, prohibits economic protectionism. “[R]egulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors” are impermissible. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (“This reading effectuates the Framers’ purpose to ‘prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.’”).

Previously, this Court found the anti-importation provisions of the ammunition sales laws likely violate the dormant Commerce Clause. California’s anti-importation of ammunition restrictions are much like the case of *Granholm v Heald*, 544 U.S. 460, 465-66 (2005), which invalidated state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. “[T]he object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint.”³⁶ The Court re-adopts its conclusions set out more fully at *Rhode*, 445 F. Supp. 3d at 948-953.

Since that time, the Supreme Court has decided *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023). *National Pork* reminds courts that “extreme caution” should be used when considering dormant Commerce Clause claims. *Id.* at 1165. The Supreme Court said, “[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of ‘extreme

³⁶ See also *Dean Milk Co. v. Madison*, 340 U.S. 349 (1950). This Court previously suggested a number of steps out-of-state ammunition vendors could take to protect California’s interest in preventing sales to prohibited persons.

delicacy,’ something courts should do only ‘where the infraction is clear.’” *Id.* While mindful of this cautionary instruction, this Court concludes that California’s ammunition anti-importation laws are exactly the kind of laws where the infraction is clear. The Attorney General has pointed to no other laws in the nation that erect a similar barrier to this one, keeping away out-of-state ammunition sellers and guaranteeing all sales originate with, or flow through, only in-state ammunition sellers. It is precisely such purposeful discrimination that lies at the core of the Supreme Court’s dormant Commerce Clause concerns. *Nat’l Pork*, 143 S. Ct. at 1153 (“Today, this antidiscrimination principle lies at the ‘very core’ of our dormant Commerce Clause jurisprudence.”) (Citation omitted). “State laws that discriminate against interstate commerce face ‘a virtually per se rule of invalidity.’” *Granholm*, 544 U.S. at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). The solution, for the benefit of the nation as a whole, is to enjoin enforcement of these protectionist laws and permit out-of-state businesses to sell directly to California’s residents.

C. Preemption by 18 U.S.C. § 926A

Plaintiffs claim that 18 U.S.C. § 926A preempts the ammunition provisions in California Penal Code § 30314 that prohibit a resident from bringing ammunition back into the state. The claim was not part of the earlier preliminary injunction; the claim was considered on the initial motion to dismiss.³⁷ Title 18 U.S.C. § 926A is part of what is known as the federal Firearm Owners Protection Act and ensures that a person may carry a firearm “from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm,” provided the person properly stores the firearm. This law expressly contemplates that ammunition will be transported with a firearm. The Plaintiffs argue that the California ammunition anti-importation laws, specifically California Penal Code § 30314, conflict with and stand as

³⁷ See Order (filed Oct. 17, 2018), Dkt. 16 at 8-11.

1 an obstacle to the accomplishment of 18 U.S.C. § 926A’s purposes, which include the
2 free transport of firearms and ammunition across state lines.

3 The California statute says, “a resident of this state shall not bring or transport into
4 this state any ammunition that he or she purchased or otherwise obtained from outside of
5 this state unless he or she first has that ammunition delivered to a licensed ammunition
6 vendor for delivery to that resident pursuant to the procedures set forth in Section
7 30312.” Cal. Pen. Code § 30314(a). There are some exceptions which do not save the
8 statute.³⁸ Subsection (c) makes a violation an infraction for the first offense and either an
9 infraction or a misdemeanor for subsequent offenses. In contrast, 18 U.S.C. § 926A
10 provides,

11 Notwithstanding any other provision of any law or any rule or
12 regulation of a State or any political subdivision thereof, any
13 person who is not otherwise prohibited by this chapter from
14 transporting, shipping, or receiving a firearm shall be entitled to
15 transport a firearm for any lawful purpose from any place where
16 he may lawfully possess and carry such firearm to any other
17 place where he may lawfully possess and carry such firearm if,
18 during such transportation the firearm is unloaded, and neither
19 the firearm nor any *ammunition* being transported is readily
20 accessible or is directly accessible from the passenger
21 compartment of such transporting vehicle: *Provided*, That in the
22 case of a vehicle without a compartment separate from the
23 driver’s compartment the firearm or *ammunition* shall be
24 contained in a locked container other than the glove
25 compartment or console.

26 (Emphasis added.)

27 There appears to be a direct conflict between the two statutes. When a law-abiding
28 California resident buys ammunition outside of the state and brings it back into

29 ³⁸ Section 30314(b) provides a list of exceptions of which only one is pertinent
30 here. Subsection (b)(6) exempts “A person who acquired the ammunition from a spouse,
31 registered domestic partner, or immediate family member as defined in Section 16720.”
32 The statute does not claim to apply to non-residents bringing ammunition into the state.

1 California, § 30314 prohibits the conduct. This is the case even if the resident complies
2 with § 926A's condition keeping the ammunition in a place not accessible from the
3 passenger compartment of the transporting vehicle and the firearm unloaded. In what is
4 likely an otherwise common occurrence with hunters and motorhome travelers, § 30314
5 criminalizes that which § 926A immunizes. It is difficult to read the two statutes
6 otherwise. There is a direct and positive conflict between the two provisions and the two
7 cannot be reconciled. In such cases, the federal statute preempts the state statute. *See* 18
8 U.S.C. § 927 ("No provision of this chapter shall be construed as indicating an intent on
9 the part of the Congress to occupy the field in which such provision operates to the
10 exclusion of the law of any State on the same subject matter, unless there is a direct and
11 positive conflict between such provision and the law of the State so that the two cannot
12 be reconciled or consistently stand together.").

13 The Attorney General argues that § 926A does not apply to ammunition although
14 the statute mentions ammunition twice. The Attorney General says that § 926A does not
15 apply to ammunition because the definition of a firearm in § 921 does not include
16 ammunition, thus, the safe harbor provision is only for transporting a firearm. But the
17 statute clearly anticipates a person traveling with both a firearm and ammunition. While
18 the Attorney General sees this as an expansion of the safe harbor, the simplest reading of
19 the statute is that a person may lawfully transport both his firearm and his ammunition, so
20 long as it is done as prescribed. The Attorney General then contends that the legislative
21 history shows that Congress intended to ensure safe passage for a firearm – not its
22 ammunition. However, statutory text is clear on its face and resort to legislative history
23 in such a case is unwarranted. Next, the Attorney General contends that its residents can
24 enjoy the safe harbor of § 926A while complying with § 30314 by simply traveling
25 without ammunition.³⁹ That requires a strained reading of the federal statute. The plain
26
27

28 ³⁹ Def.'s Omnibus Brief at 23.

1 reading of § 926A provides a safe harbor for travelling with both a firearm and
 2 ammunition. For California residents travelling home with newly acquired ammunition
 3 for their firearm, the metaphorical harbor is anything but safe.

4 In a final push, the Attorney General maintains that even if § 926A does cover
 5 ammunition, § 30314 is still not preempted.⁴⁰ The argument hinges on an unorthodox
 6 view that since California residents cannot legally bring ammunition into the state, then
 7 they cannot legally possess the ammunition they brought in. And if they cannot legally
 8 possess the ammunition they brought in, then they do not qualify under § 926A's second
 9 proviso, *i.e.*, that the person transporting the firearm and ammunition be "entitled by law
 10 to possess it in the place to which it is being transported." That notion hangs on a
 11 cramped view of a citizen's federal constitutional right to keep and bear arms, which is a
 12 right a citizen enjoys everywhere in the country. Here, it is the case that California Penal
 13 Code § 30314(a) directly conflicts with 18 U.S.C. § 926A and is therefore preempted to
 14 the extent that it criminalizes a resident who transports a firearm and ammunition in
 15 compliance with the requirements of § 926A, and state enforcement is enjoined.

16 V. CONCLUSION

17 The ammunition background checks laws have no historical pedigree and operate
 18 in such a way that they violate the Second Amendment right of citizens to keep and bear
 19 arms. The anti-importation components violate the dormant Commerce Clause and to the
 20 extent applicable to individuals travelling into California are preempted by 18 U.S.C. §
 21 926A. Perhaps the simpler, 4-year and \$50 ammunition purchase permit approved by the
 22 voters in Proposition 63, would have fared better.

23 Accordingly, the Court permanently enjoins the State of California from enforcing
 24 the ammunition sales background check provisions found in California Penal Code §§
 25 30352 and 30370(a) through (e), and the ammunition anti-importation provisions found
 26

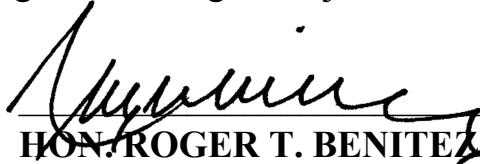
27
 28 ⁴⁰ *Id.* at 24.

1 in §§ 30312(a) and (b) and 30314(a). Criminal enforcement of California Penal Code §§
2 30312(d), 30314(c), and 30365(a) by the Attorney General and all other law enforcement
3 defendants is permanently enjoined.

4 **Therefore, IT IS HEREBY ORDERED that:**

- 5 1. Defendant Attorney General Rob Bonta, and his officers, agents, servants,
6 employees, and attorneys, and those persons in active concert or participation
7 with him, and those duly sworn state peace officers and federal law enforcement
8 officers who gain knowledge of this injunction order or know of the existence of
9 this injunction order, are enjoined from implementing or enforcing the
10 ammunition sales background check provisions found in California Penal Code
11 §§ 30352 and 30370(a) through (e), and the ammunition anti-importation
12 provisions found in §§ 30312(a) and (b) and 30314(a), as well as the criminal
13 enforcement of California Penal Code §§ 30312(d), 30314(c), and 30365(a).
14 2. Defendant Attorney General Rob Bonta shall provide forthwith, by personal
15 service or otherwise, actual notice of this order to all law enforcement personnel
16 who are responsible for implementing or enforcing the enjoined statutes.

17
18 DATED: January 30, 2024

19 
20 **HON. ROGER T. BENITEZ**
21 United States District Judge
22
23
24
25
26
27
28