

No. 20-55437

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

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KIM RHODE; GARY BRENNAN; CORY HENRY; EDWARD JOHNSON; SCOTT LINDEMUTH; RICHARD RICKS; DENISE WELVANG; ABLE'S SPORTING, INC., A TEXAS CORPORATION; AMDEP HOLDINGS, LLC, A FLORIDA LIMITED LIABILITY COMPANY D/B/A AMMUNITION DEPOT; R & S FIREARMS, INC., AN ARIZONA CORPORATION D/B/A/ SAM'S SHOOTERS EMPORIUM; AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, A CALIFORNIA CORPORATION,  
*Plaintiffs-Appellees,*

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,  
*Defendant-Appellant.*

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**On Appeal from the United States District Court  
for the Southern District of California**  
No. 18-cv-00802-BEN-JLB  
The Honorable Roger T. Benitez, Judge

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3  
TO STAY PRELIMINARY INJUNCTION ORDER PENDING APPEAL  
(FED. R. APP. P. 8(A)(2); CIRCUIT RULE 27-3)**

**IMMEDIATE RELIEF REQUESTED**

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April 24, 2020

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## **CIRCUIT RULE 27-3 CERTIFICATE**

Defendant-Appellant Xavier Becerra, in his official capacity as the Attorney General of the State of California, hereby moves this Court on an emergency basis for an order staying the district court's preliminary injunction order, entered on April 23, 2020, pending appeal. Fed. R. App. P. 8(a)(2); 9th Cir. R. 27-3. The district court's preliminary injunction order enjoins the continued enforcement of California's ammunition background check law and restrictions on shipping ammunition directly to purchasers, *e.g.*, Cal. Penal Code §§ 30370(a)-(d), 30352, 30312(a)-(b), 30314, which have been in effect for 10 months and 2 years, 3 months, respectively. To preserve the status quo pending appeal of the preliminary injunction order, the Attorney General requests an immediate stay.

The undersigned counsel certifies the following the information, as required by Ninth Circuit Rule 27-3(c).

**(1) Names, Telephone Numbers, E-Mail Addresses, and Office Addresses for the Attorneys for All Parties (9th Cir. R. 27-3(c)(i)):**

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**(2) Facts Showing the Existence and Nature of the Emergency (9th Cir. R. 27-3(c)(ii)):**

Time is of the essence here because the district court's order, entered April 23, 2020, was effective upon issuance. More than ten months after they took effect—and more than eight months after plaintiffs in this case filed their motion for a preliminary injunction—the district court facially enjoined California's ammunition background check laws, concluding that they likely violate the Second Amendment and the dormant Commerce Clause. The court below entered that injunction despite the fact that no plaintiff in this case has shown that the laws have prevented them from purchasing ammunition (or even substantially delayed their ability to do so), and despite the fact that the evidence in this case shows that the average purchaser need only wait anywhere between a matter of minutes to a few days to undergo the background check, depending on which type of check they choose.

There was no basis for the district court's order enjoining the continued enforcement of these vital public-safety measures during the pendency of the case and made its injunction effective immediately. That decision will result, and may have already resulted, in prohibited persons purchasing ammunition from ammunition stores—potentially hundreds of them in the months it might take to

litigate the preliminary injunction appeal. Within hours of the decision, at least one ammunition dealer had already begun advertising that the district court’s judgment allowed customer to “again purchase ammo without a background check and order ammo online!”<sup>1</sup> And in the court below, the Attorney General submitted evidence showing that, from the time the ammunition background check laws went into effect on July 1, 2019, through January 31, 2020, over 750 prohibited persons had been prevented from purchasing ammunition. At the very least, the decision below makes removes a substantial barrier for individuals like these to purchase ammunition.

Preserving the status quo will thus prevent prohibited people from acquiring ammunition, and will not prevent the individual plaintiffs—or any similarly situated purchasers—from doing so. And that possibility is far from remote. Just last year, the same district court issued a permanent injunction enjoining California’s limitation on the manufacture, sale, and importation of large-capacity magazines (magazines that can hold ten rounds or more). *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019). Although the Attorney General promptly requested an immediate stay of the judgment pending appeal, the district court waited four days to grant the stay, made the stay effective the following day, and permitted anyone who acquired

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<sup>1</sup> See Richards Decl. Ex. 13, Ammunition Depot (@AmmunitionDepot), Twitter (Apr. 23, 2020, 4:29 PM), <https://twitter.com/AmmunitionDepot/status/1253465990400270336>.

large-capacity magazines during the interim to keep them during the appeal.

During that time period, companies trumpeted the court's ruling; and according to at least one report, over *one million* large-capacity magazines flooded into the State during that time. *See* Richards Decl., Ex. 14 (“More than a million high-capacity ammunition magazines flooded into California during a one-week window created when a federal judge temporarily threw out the state's ban, gun owners' groups estimated Thursday.”). An immediate stay is necessary to avoid the same result here.

**(3) Why the Motion Could Not Have Been Filed Earlier (9th Cir. R. 27-3(c)(iii)):**

The preliminary injunction was issued on April 23, 2020. The Attorney General this emergency motion on April 24, 2020. I notified the Ninth Circuit court staff by voicemail and e-mail prior to filing this emergency motion.

**(4) When and How Counsel Were Notified and Served and Plaintiffs' Position on the Emergency Motion (9th Cir. R. 27-3(c)(iv)):**

The undersigned counsel called counsel for plaintiffs on April 24, 2020, and informed him of the Attorney General's intent to file this emergency motion and request for immediate relief. Counsel for plaintiffs stated plaintiffs' intent to oppose this motion. This emergency motion was served on April 24, 2020, by electronic mail and overnight mail.

**(4) The Requested Relief Was First Sought in the District Court (9th Cir. R. 27-3(c)(v)):**

At 10:40 a.m. on April 24, 2020, less than 24 hours after the district court issued the preliminary injunction, the Attorney General requested that the court stay its order pending appeal. At 2:58 p.m. on April 24, 2020, the district court denied that motion. Richards Decl. Ex. 12, Order Denying Ex Parte Motion for Stay, ECF No. 62.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 24, 2020

Respectfully submitted,

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*/s/ Nelson Richards*  
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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3  
TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

**INTRODUCTION**

Yesterday, the district court facially enjoined the State of California from enforcing laws that are actively preventing prohibited people from purchasing ammunition. As a result, as of this moment, these laws—which have been in place for more than ten months and have prevent hundreds of prohibited persons from purchasing ammunition—cannot be enforced. And ammunition venders have already begun advertising that the district court’s judgment allowed customer to “again purchase ammo without a background check and order ammo online!” *See* Richards Decl., Ex. 13. And absent a stay, it is very likely that many prohibited persons will obtain ammunition during the time it takes to resolve this appeal.

A stay is therefore warranted in this case. What is more, the district court’s analysis is deeply flawed. The challenged laws, enacted in 2016 by the voters in Proposition 63, and amended by Senate Bill 1235 (2016 Cal. Stat., ch. 55),<sup>2</sup> require all ammunition to be sold in face-to-face transactions where the purchaser will undergo a background check. Since the background check provision went into effect on July 1, 2019, over 750 prohibited people have been prevented from purchasing ammunition, and the number continues to grow. Yet more than nine

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<sup>2</sup> This motion will refers to these laws together as “Prop. 63.”

months after they took effect, the district court granted the “extraordinary and drastic remedy” of a preliminary injunction, *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012)—in a case brought by plaintiffs who utterly failed to show that these laws have prevented them from obtaining ammunition.

Every factor of the test for whether to enter a stay counsels in favor of granting one here. The Attorney General is likely to prevail on the merits for several reasons. First, no individual plaintiff alleged, or submitted evidence showing, that he or she has not been able to purchase ammunition. To paraphrase this Court, “conspicuously missing from this lawsuit is any honest-to-God resident . . . complaining that he or she cannot lawfully buy [ammunition].” *See Teixeira v. County of Alameda*, 873 F.3d 670, 680-81 (9th Cir. 2017) (en banc) (quotation marks and brackets omitted). And even if it is possible that the challenged laws are prohibiting an otherwise-lawful purchaser from obtaining ammunition, that is not a basis for entering a broad facial injunction that bars the State from enforcing its laws in every application.

Even if a plaintiff could establish that they were denied the ability to procure ammunition, the district court’s constitutional analysis is incorrect. The Supreme Court has made clear that the public authorities may employ a “variety of tools” for combatting the problem of gun violence in this country that are consistent with the Second Amendment. *District of Columbia v. Heller* 554 U.S. 570, 636 (2008);

*accord McDonald v. City of Chicago*, 561 U.S. 742, 786 (plurality opinion) (the Second Amendment “does not imperil every law regulating firearms”). And this Court previously upheld 10-day waiting period for the purchase of firearms that is less burdensome than the one at issue here. *See Silvester v. Harris*, 843 F.3d 816, 830 (9th Cir. 2016). As for the dormant Commerce Clause claim, the district court erred as a matter of law by holding that Prop. 63 treats California businesses differently from out-of-state business. The law prohibits any business, regardless of its place of residence, the same.

Most importantly, the balance of the equities tips overwhelmingly in favor of a stay. The State and its residents will be irreparably harmed absent a stay pending appeal if its background check laws are suspended because a significant barrier to prohibited people purchasing ammunition will disappear. On the other side of the ledger, there is no harm to the plaintiffs in this case—none of whom have shown they cannot obtain ammunition. To ensure the orderly resolution of plaintiffs’ constitutional challenge to Prop. 63 and preserve the status quo pending appeal, the Court should grant the Attorney General’s emergency motion.

## **BACKGROUND**

### **I. PROPOSITION 63**

Prop. 63 introduced “reasonable and common-sense reforms” to California’s gun laws while “safeguarding the Second Amendment rights of all law-abiding,

responsible Californians.” Prop. 63 § 3.1. The voters found that these reforms were necessary because gun violence kills or seriously injures thousands of Californians each year, “destroy[ing] lives, families and communities.” Prop. 63 §§ 2.1-2.4. Loopholes in the State’s gun safety laws permitted violent felons and other persons prohibited from possessing firearms and ammunition to perpetuate gun violence. Prop. 63 §§ 2.5-2.8.

One of the most significant of these regulatory gaps allowed people who could not pass a firearms background check to purchase ammunition from a gun shop, sporting goods store, or other lawful vendor. Prop. 63 §§ 2.6-2.7. The voters decided that the law should “require background checks for ammunition sales just like gun sales[.]” Prop. 63 §§ 2.6-2.7. Prop. 63 amended the California Penal Code to close the loophole, and regulate the sale or transfer of ammunition.

To help achieve that goal, Prop. 63 amended the California Penal Code to regulate the sale or transfer of ammunition in a manner similar to the sale or transfer of guns.<sup>3</sup> Most of the provisions in Prop. 63 have analogues to firearms laws. *Compare, e.g.*, Cal. Pen. Code § 30314 (requiring ammunition imported into State to be delivered by ammunition vendor) *with id.* § 27585 (requiring firearms

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<sup>3</sup> Before the November 2016 election, the California Legislature enacted Senate Bill 1235 (2016 Cal. Stat., ch. 55). That law amended aspects of Prop. 63. References to Prop. 63 are to the law as amended.

imported into State to be delivered by firearms vendor). Starting January 1, 2018, ammunition sales, deliveries, or transfers in California had to be conducted by, or processed through, a licensed ammunition vendor in a face-to-face transaction. Cal. Penal Code § 30312(a)-(b). Californians may still purchase ammunition online or from other lawful sources that do not have a physical location in California. *See id.* § 30312(b). But those purchases must be received and processed by a California-licensed ammunition vendor. *Id.* Similarly, residents who want to bring ammunition into California that they have obtained outside the State must first deliver it to a licensed ammunition vendor. *Id.* § 30314. As of July 1, 2019, licensed ammunition vendors must conduct background checks before selling or transferring ammunition to a buyer in California. *Id.* §§ 30352, 30370.

## **II. AMMUNITION BACKGROUND CHECKS**

In the lead-up to the July 1, 2019 implementation date, the California Department of Justice (Department) promulgated regulations outlining four types of background checks for purchasing ammunition. *See* Cal. Code Regs., tit. 11, §§ 4302-05. The two checks that feature prominently in this case are Standard Ammunition Eligibility Checks (Standard Checks), *id.* § 4302, and Basic Ammunition Eligibility Checks, *id.* § 4303.



Standard Checks are available to purchasers who have a firearm record in the State's Automated Firearms System (AFS) and cost \$1. *Id.* § 4302; Morales Decl. ¶¶ 17-18, ECF No. 34-1. Purchasers using this check submit their ID at the time of sale, and the ammunition vendor submits the ID information to the Department's automated computer system. Morales Decl. ¶ 18, ECF No. 34-1. If the purchaser's name, address, date of birth, and ID number match an entry in the system, then the record is compared to the State's Prohibited Armed Persons File to check whether the purchaser has become prohibited since he or she purchased the firearm in the system. *Id.* ¶ 19.

Anyone can undergo a Basic Check to purchase ammunition. Cal. Code Regs., tit. 11, § 4303; Third Supp. Morales Decl. ¶¶ 7-8, ECF No. 53. It costs \$19 and requires the purchaser to provide an ID. Third Supp. Morales Decl. ¶ 8, ECF No. 53. The ammunition vendor submits the purchaser's ammunition to the Department's automated system, which checks four state databases to determine whether the purchaser is prohibited from purchasing ammunition, for example, because he or she has a felony conviction. *Id.* If the information yields no hits in the system, the check is processed automatically. *Id.* ¶ 9. But if there is a hit, a Department analyst must conduct a manual review. *Id.*

Before July 1, 2019, and in anticipation of the Federal REAL ID Act going into effect in October 2020, the Department promulgated a regulation establishing

the ID requirements for firearms and ammunition purchases. Cal. Code Regs., tit. 11, § 4045.1; *see also* Morales Decl. ¶¶ 36-45, ECF No. 34-1. This regulation required those purchasers who have IDs with the notation “FEDERAL LIMITS APPLY” on them to provide ammunition vendors with additional supporting identification, such as a passport. Cal. Code Regs., tit. 11, § 4045.1.

### **III. THE BACKGROUND CHECK LAW GOES INTO EFFECT JULY 1, 20219**

On July 1, 2019, the ammunition background check law went into effect. In its first month, it stopped over 100 prohibited persons from purchasing ammunition. Morales Decl. ¶ 49, ECF No. 34-1. From July 2019 through January 2020, it prevented over 750 prohibited persons from purchasing ammunition. *See* Third Supp. Morales Decl. ¶ 6 & tables 1.1, 2.1, ECF No. 53. The average Standard Check took about five minutes. *See* Morales Decl. ¶ 55, ECF No. 34-1. And the average Basic Check took about two business days. Third Supp. Morales Decl. ¶ 13 & table 1.2, ECF No. 53.

Initially, about 20% of the Standard Checks were rejected for various reasons.<sup>4</sup> By early 2020, the number of rejections had dropped to about 13%, with

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<sup>4</sup> The three most common were (1) the purchaser’s address did not match information in AFS (about 40% of the rejections); (2) the purchaser had no discernable AFS entry (about 27% of the rejections); and (3) the purchaser’s name did not match an AFS record (about 16% of rejections). Third Supp. Morales Decl. ¶¶ 39-41 & table 2.2, ECF No. 53.

the reasons for the rejections staying roughly consistent over time.<sup>5</sup> *Id.* ¶¶ 23, 39 & table 2.2. All of these purchasers could still use a Basic Check to purchase ammunition. *Id.* ¶ 26. In addition, purchasers who had a Standard Check rejected could correct their record through the Department's website. *See Morales Decl.* ¶¶ 18-24, ECF No. 34-1. Many purchasers who had a Standard Check rejected have gone on to purchase ammunition. *Third Supp. Morales Decl.* ¶¶ 43-52 & table 2.3, ECF No. 53.

#### **IV. THE DISTRICT COURT PROCEEDINGS**

Plaintiffs, seven California residents, four out-of-state ammunition vendors, and the California Rifle & Pistol Association, filed a complaint challenging Prop. 63 on April 26, 2018. *Compl.*, ECF No. 1. They filed the First Amended Complaint (FAC), the operative pleading, on June 11, 2018. *FAC*, ECF No. 9. The FAC alleges that Prop. 63's ammunition background check provisions violate the Second Amendment and its restrictions on direct shipment of ammunition to purchasers violate the dormant Commerce Clause. *See generally* FAC. Notably, the FAC did not allege any claims about the implementation of the background check law or challenge the Department's ID regulation.

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<sup>5</sup> Although not in the record, the number of rejections has recently increased, in apparent response to the increase in purchasing apparently tied to the COVID-19 outbreak and related stay-at-home orders. But the increase appears to be subsiding.

In late July 2019, after the background check requirements went into effect, plaintiffs filed a motion for preliminary injunction. Pls.' PI Mot., ECF No. 32. Only two individual plaintiffs submitted declarations. One stated that she had purchased ammunition using a Standard Check and it had taken “nearly 30 minutes.” Welvang Decl. ¶ 4, ECF No. 32-6. The other said two vendors he uses stopped selling ammunition and another had temporarily stopped selling ammunition. Lindemuth Decl. ¶¶ 3-5, ECF No. 32-7.

The Attorney General opposed the motion. Defs. Opp'n, ECF No. 34. The district court held a hearing on the motion on August 19, 2019, where it requested additional evidence from the Attorney General and took the matter under submission. The Attorney General submitted the requested evidence. Supp. Morales Decl., ECF No. 42. Over the next 8 months, the court requested, and the Attorney General provided additional evidence. On April 24, 2020, the district court issued a preliminary injunction. Order, ECF No. 60.

### **ARGUMENT**

Defendants' emergency motion satisfies the four factors that this Court considers in determining whether to stay an order pending appeal. *See Humane Soc'y of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) (“A party seeking a stay must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of relief, [3] that the balance of equities

tip in his favor, and [4] that a stay is in the public interest.” (citing *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008))). Although there must be a minimal showing for each factor, courts must balance these factors, employing a flexible approach that considers the facts of the particular case. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011); *see also Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). To obtain a stay, a party “need not demonstrate that it is more likely than not that they will win on the merits” or that “ultimate success is probable.” *Leiva-Perez*, 640 F.3d at 966-67. A “substantial case on the merits” or “serious legal questions” will suffice “so long as the other factors support the stay.” *Id.* (quoting *Hilton*, 481 U.S. at 778).

#### **V. DEFENDANTS ARE LIKE TO SUCCEED ON THE MERITS**

A party seeking a stay pending appeal can demonstrate a likelihood of success on the merits by demonstrating that the appeal concerns “serious legal questions, or has a reasonable probability or a fair prospect of success.” *Leiva-Perez*, 640 F.3d at 971. A party seeking a stay pending appeal “must show that there is a ‘substantial case for relief on the merits’”—a “standard [that] does not require the petitioners to show that ‘it is more likely than not that they will win on the merits.’” *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012).

At a minimum, this appeal raises “serious legal questions” warranting a stay pending appeal. *See Leiva-Perez*, 640 F.3d at 971. The district court’s decision

contains numerous patent errors of law. Many of them flow from three fundamental mistakes.

*First*, no plaintiff in this case has standing. To invoke the jurisdiction of Article III courts, plaintiffs must show that they have suffered a “concrete and particularized” injury in fact that is “fairly traceable to the challenged conduct of the defendant and is likely to be redressed by a favorable judicial decision.” *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1116 (9th Cir. 2020). Yet no individual plaintiff in this case submitted any evidence showing that they had a Standard Check rejected or that their background checks had taken any more than half an hour.<sup>6</sup> *See* Welvang Decl. ¶ 4, ECF No. 32-6.<sup>7</sup> And while plaintiffs submitted a declaration from one member of plaintiff California Rifle & Pistol Association saying that he had a Standard Check rejected, that declarant was able to follow the process for updating his AFS record and purchase ammunition within 10 days of his rejection. *See* Ionescu Decl. ¶¶ 3-11, ECF No. 46-4.

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<sup>6</sup> The district court’s decision discusses the ID regulation, Cal. Code Regs., tit. 11, § 4045.1, at length. Opn. at 9-14. But no plaintiff alleged that they had a “federal limits apply” ID. It is thus not clear how the ID regulation was relevant to the district court’s decision.

<sup>7</sup> The Attorney General submitted evidence suggesting that Welvang had overstated the time her transaction took when she said it took half an hour, and that she omitted mentioning another purchase the same day. Morales Decl. ¶¶ 67-69, ECF No. 34-1.

Instead of focusing on the parties actually in front of it, the district court’s decision rests in large part on speculation about the rate at which *other parties not before the court have been rejected*. Even assuming that the State’s laws prevent otherwise lawful purchasers from buying ammunition in some circumstances, that is no basis for entering a broad injunction like the one issued here. To succeed on their facial challenge, the plaintiffs were required to “establish that no set of circumstances exists under which the [regulation or statute] would be valid.” *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104, 1104 n.6 (9th Cir. 2016) (“*Salerno* remains binding law in the Ninth Circuit . . . and we are not free to ignore it.”).<sup>8</sup> Yet the court below effectively applied the opposite rule, relying on speculation about the possibility that *some* otherwise-lawful purchasers might be prevented from purchasing ammunition as a basis to enjoin the State’s laws in *every* application. And that was especially inappropriate here, where the evidence in the record shows that many ammunition purchasers can and do purchase ammunition using a Standard Check that costs \$1 and takes a matter of minutes. *See* Morales Decl. ¶ 55, ECF No. 34-1. The average \$1 Standard Check takes about five minutes, Morales Decl. ¶ 55, ECF

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<sup>8</sup> *See also GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260-91 (11th Cir. 2012) (“We view the Second Amendment challenge as essentially raising only a facial challenge. . . . Plaintiffs must show that the Carry Law is unconstitutional in all applications to prevail in their facial challenge.”).

No. 34-1, while the average \$19 Basic Check takes about two business days, *see* Third Supp. Morales Decl. ¶ 13 & table 1.2, ECF No. 53. Courts “may not resolve questions of constitutionality with respect to each potential situation that might develop, especially when the moving party does not demonstrate that the legislation would be unconstitutional in a large fraction of relevant cases.” *Jackson v. City & County of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014) (quotation marks omitted).<sup>9</sup>

In concluding otherwise, the district court focused largely on the fact that as average of 16% (recently closer to 13%) of Standard Checks have been denied. *See, e.g.*, Opn. at 56 (“an inexplicably large number of firearm owners are suffering the severest burden”). But a Standard Check rejection does not mean that the purchaser cannot purchase ammunition. A person who is rejected can still purchase ammunition using a Basic Check. *See* Cal. Code Regs., tit. 11, § 4303; Third Supp. Morales Decl. ¶¶ 7-8, ECF No. 53. And between 40% and 50% of purchasers who had a Standard Check rejected have purchased ammunition since their rejection. *See* Third Supp. Morales Decl. ¶¶ 43-52 & table 2.3, ECF No. 53. These purchasers have either followed the process for updating their AFS records,

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<sup>9</sup> *See also United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc) (“A person to whom a statute properly applies can’t obtain relief based on arguments that a differently situated person might present.”).



and have used a Standard Check, have used a Basic Check, or used one of the other two background checks. *See id.* ¶¶ 43-52.<sup>10</sup>

Moreover, the record discloses very little, if anything, about why these would-be purchasers did not ultimately purchase ammunition. Given that just under 30% of rejections correspond to no identifiable AFS record—meaning that the purchaser likely does not have a firearm record in AFS—it is possible that some of those people were prohibited persons trying to avoid the more intensive Basic Check. *See* Third Supp. Morales Decl. ¶ 40 & table 2.2, ECF No. 53.

Without more facts, the district court’s inference of a constitutional violation, when those who receive a Standard Check rejection may purchase ammunition after either fixing their AFS record, passing a Basic Check, or both, has no support.

The district court’s decision provides a case in point about the problems the Supreme Court has found with facial challenges being disfavored. *See Wa. State*

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<sup>10</sup> The district court also relied on anecdotes about other individual’s experiences—but in the case non-party declarant, George Dodd, misunderstood how California’s laws work. Opn. at 17-18 (discussing Dodd Decl., ECF No. 32-16). As Dodd recounts in his declaration, he was adopted at a young age under circumstances that prevent him from easily obtaining his birth certificate. *Id.* at 18. The district court stated that “[w]ith a certified copy of his birth certificate, he is unable to obtain a U.S. Passport. Without a birth certificate or passport, Dodd cannot obtain a California issued REAL ID card.” *Id.* The district court is simply wrong. California law allows those who cannot submit documents such as birth certificates to obtain a REAL ID through alternate means. *See* Cal. Code Regs. tit. 13, § 17.06. Moreover, Dodd is not a plaintiff and his experience is uncommon—not the evidentiary or legal foundation for facially invalidating a law.

*Grange v. Wa. State Republican Party*, 552 U.S. 442, 450 (2008). Moreover, because “all agree that a facial challenge must fail where the statute has a plainly legitimate sweep,” *id.* at 449 (quotation marks omitted), and, here, no plaintiff experience the purported harm identified by the district court, nor did the vast majority of purchasers, the district court should have denied the plaintiffs’ motion for preliminary injunction.

**Third**, the district court applied the wrong legal standard. *See* Opn. at 51-59. In evaluating Second Amendment claims, this Court (like most other courts of appeals) has adopted a “two-step inquiry” that asks whether “the challenge law burdened conduct protected by the Second Amendment” and, if so “directs courts to apply an appropriate level of scrutiny.” *Mai v. United States*, 952 U.S. 1106, 1113 (9th Cir. 2020) (citations and quotation marks omitted). That test reflects the Supreme Court’s recognition that the Second Amendment right is “not unlimited,” and, does not call into question certain “presumptively lawful regulatory measures.” *Heller*, 554 U.S. at 626-627 & n.26.

Applied here, that framework shows—at the very least—that the Attorney General is likely to show that challenged laws are constitutional. Intermediate scrutiny is the most demanding standard that can be applied to Prop. 63’s ammunition background check laws because they “regulate only the ‘*manner* in which persons may exercise their Second Amendment rights’” and are thus “less

burdensome than those which bar firearms possession completely.” *See Silvester*, 843 F.3d at 827 (quoting *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)).<sup>11</sup> This Court has analyzed similar laws under intermediate scrutiny. *See Silvester*, 843 F.3d at 827 (10-day waiting period for firearm purchases); *Jackson*, 746 F.3d at 964 (law requiring handguns to be stored in a locked safe or with a trigger lock when not carried on the person and law banning the sale of hollow-point bullets).

The intermediate scrutiny “test is not a strict one.” *Silvester*, 843 F.3d at 827. “Intermediate scrutiny requires (1) a significant, substantial, or important government objective, and (2) a ‘reasonable fit’ between the challenged law and the asserted objective.” *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018). It does not require the fit between the challenged regulation and the stated objective to be perfect, nor does it require that the regulation be the least restrictive means of serving the interest. *Jackson*, 746 F.3d at 969. Rather, the government “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” *Id.* at 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). Courts do not look to evidence “in the technical

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<sup>11</sup> At least in the context of this case—where no plaintiff has shown that he or she cannot get access to ammunition—the district court’s suggestion that the background check law constituted a complete ban on the ability of an otherwise lawful-purchase to get firearms is incorrect. *See Opn.* at 58-59 & n.35.

sense” because “legislatures are not obligated, when enacting their statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review[.]” *Pena*, 898 F.3d at 979 (quotation marks omitted).<sup>12</sup>

Here, there is no dispute that the State has an important—and indeed compelling—interest in reducing gun violence and promoting public safety. *Mai*, 952 F.3d at 1120. And there is certainly a “reasonable fit” between that goal and the background check laws: the evidence reveals that 750 people who are not lawfully entitled to purchase ammunition were prevented from doing so, and that in the vast majority of cases lawful purchasers need only wait a matter of minutes—or, at most, days—to obtain ammunition. *See generally* Third Supp. Morales Decl., ECF No. 53. Indeed, in a similar case, this Court rejected a Second Amendment challenge to California’s requirement that individuals who want to purchase firearms wait 10 days so that the State can conduct a background check. *Silvester*, 843 F.3d at 830.

Finally, the district court applied the wrong legal standard to plaintiffs’ dormant commerce clause case. *See* Opn. at 96-109. Prop. 63 treats all online

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<sup>12</sup> The district court criticizes *Pena*, 898 F.3d 969, asking “When did the federal courts become so deferential to government intrusions into constitutionally protected rights?” Opn. 66.

sellers, whether those in California or out of state, the same. A California company that sells ammunition over the internet must have ammunition delivered to customers in California through a California-licensed ammunition vendor, just like Plaintiff out-of-state businesses. *See* Cal. Pen. Code § 30312(b). And an out-of-state ammunition vendor that has a physical store in California may obtain a license and sell ammunition in California. *See id.* § 30312. Laws that treat “all private companies exactly the same” do not discriminate against interstate commerce in violation of the dormant Commerce Clause. *See Pharm. Research & Mfrs. of Am. v. Alameda*, 768 F.3d 1037, 1042 (9th Cir. 2014) (quotation marks omitted). That is why the Western District of New York dismissed a dormant Commerce Clause challenge to a similar provision of New York law that effectively bans remote sales by requiring that ammunition purchases take place in person. *See N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d 349, 379-81 (W.D.N.Y. 2013). The district court did not discuss this on-point authority.

#### **VI. THE STATE WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.**

The factor of irreparable harm is a “bedrock requirement” for the issuance of a stay. *Leiva-Perez*, 640 F.3d at 965. It is significant, then, that “a state suffers irreparable injury whenever an enactment of its people or representatives is enjoined.” *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). The preliminary injunction alters the status quo and enjoins enforcement of vital

public-safety measures that have been in effect for over 10 and 24 months, respectively, and that have stopped over 750 prohibited people from purchasing ammunition. The State and its residents will unquestionably be harmed by this order, as violent felons and others who have had a significant impediment to their access to ammunition removed. Indeed, one of the ammunition vendor plaintiffs, Ammunition Depot, took to Twitter within hours of the district court's decision, inviting customers to purchase ammunition online. *See* Richards Decl., Ex. 12 (“Californians may again purchase ammo without a background check and order ammo online!”). The evidence in the record shows that prohibited people will almost certainly take advantage of the break. *See* Third Supp. Morales Decl. ¶ 6 & tables 1.1, 2.1, ECF No. 53.

Indeed, the possibility that prohibited individuals will obtain ammunition absent a stay is much more than speculative. Just last year, the same district court permanently enjoined California's ban on the manufacture, sale or importation of large-capacity magazines. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019). The Attorney General promptly asked the district court to stay its decision; and in the four days between that filing and when the district court ultimately entered the stay, a flood of large-capacity magazines entered the State. According to one report, over a *one million* large-capacity magazines were imported into the State while the district

judge considered the Attorney General's application for a stay. *See* Richards Decl., Ex. 14.

An immediate stay of the district court's preliminary injunction is required to prevent a similar disruption of the status quo in this case.

**VII. THE BALANCE OF THE HARMS AND THE PUBLIC INTEREST STRONGLY FAVOR A STAY.**

In comparison with the irreparable harm suffered by the State and its residents if a stay is not issued pending the appeal, a stay will not in any way prevent any plaintiff from purchasing ammunition during this appeal. And the enjoined provisions of the Prop. 63 have been in effect for months, so any additional delay pending appeal would be comparatively minor and would preserve the status quo until this matter is finally resolved. Indeed, any sense of urgency in the district court's order is belied by the fact that the court took 8 months to rule on the motion. During that time, hundreds of additional prohibited people were prevented from purchasing ammunition from vendors, while the plaintiffs could purchase ammunition, and all lawful residents had an avenue, in one form or another, to purchase ammunition.

**CONCLUSION**

To preserve the status quo during this interlocutory appeal, the Attorney General respectfully request that the Court issue an immediate stay of the district court's April 23, 2020 preliminary injunction order.

Dated: April 24, 2020

Respectfully submitted,

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**STATEMENT OF RELATED CASES**

The Attorney General is not aware of any related cases pending before this Court.

## CERTIFICATE OF SERVICE

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

No. **20-55437**

I hereby certify that on April 24, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO STAY PRELIMINARY  
INJUNCTION ORDER PENDING APPEAL**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 24, 2020, at Sacramento, California.

Tracie L. Campbell

Declarant

*/s/ Tracie Campbell*

Signature