

No. _____

In The
Supreme Court of the United States

JEFF SILVESTER; BRANDON COMBS; THE CALGUNS
FOUNDATION, INC., a non-profit organization; and THE
SECOND AMENDMENT FOUNDATION, INC., a non-profit
organization,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of
California,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit applied improperly lenient scrutiny in a Second Amendment challenge to the application of California's full 10-day waiting period to firearm purchasers who pass their background check in fewer than 10 days and already own another firearm or have a concealed carry license?
2. Whether this Court should exercise its supervisory powers to cabin the Ninth Circuit's concerted resistance to and disregard of this Court's Second Amendment decisions?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Jeff Silvester and Brandon Combs were the plaintiffs in the district court and the appellees in the Ninth Circuit. Petitioners the Calguns Foundation, Inc., and the Second Amendment Foundation, Inc., are non-profit corporations and were also plaintiffs in the district court and appellees in the Ninth Circuit. Neither corporate petitioner is publicly traded and neither has a parent corporation.

Respondent Xavier Becerra is the current Attorney General of California and the successor to Kamala Harris, the Attorney General of California at the time of the litigation in the courts below. General (now Senator) Harris, was the defendant in the district court and was the appellant in the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for the Eastern District of California and its order granting judgment in favor of Petitioners are available at 41 F. Supp.3d 927 and are attached at Appendix B1-B91.

The decision of the Ninth Circuit reversing the district court is available at 84 F.3d 816 and is attached at Appendix A1-A33. The Ninth Circuit's order denying the petition for rehearing or rehearing *en banc* is unpublished but available on PACER, Case Number 14-16840, DktEntry 90, and is attached at Appendix C1-C2.

JURISDICTION

The Ninth Circuit issued its order denying rehearing and rehearing *en banc* on April 4, 2017. Justice Kennedy granted Petitioners an extension of time to file this Petition to and including September 1, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**STATUTES AND CONSTITUTIONAL
PROVISIONS INVOLVED**

California Penal Code § 26815 provides, in relevant part:

No firearm shall be delivered:

(a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.

California Penal Code § 27540(a) provides, in relevant part:

A dealer, * * * shall not deliver a firearm to a person, as follows:

(a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.

The Second Amendment, U.S. CONST. AMEND. II, provides:

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.

STATEMENT OF THE CASE

1. California requires most purchasers of a firearm to wait 10 days before they can take possession of the firearm, regardless whether their background checks are completed in less time. This case involves a challenge to the application of California’s full 10-day waiting period to those purchasers who already own a firearm or have a license to carry a concealed weapon, and who clear a background check in fewer than 10 days.

Forbidding delivery of a firearm to such “subsequent” purchasers for longer than it takes to complete their background checks is an arbitrary and irrational burden on their Second Amendment rights. California’s only purported justifications for applying the full waiting period to such persons – having time to ensure eligibility to purchase a firearm and providing a “cooling off” period to guard against rash use of the newly purchased firearm – lack any factual or logical support as applied to the class of purchasers at issue here. And such asserted justifications certainly do not satisfy any form of heightened scrutiny under the Second Amendment. The district court, after a bench trial, agreed, but the Ninth Circuit nonetheless reversed, a result that is as unsupportable as it is unsurprising.

2. Individual Petitioners are two California residents who already own firearms, desire to purchase firearms in the future, and have a reasonable expectation that they would easily pass any subsequent background checks in fewer than 10 days. The organizational Petitioners are two non-profit groups that advocate in defense of Second Amendment rights and

which have members that, like the individual Petitioners, already own firearms, desire to purchase additional firearms in the future, and would pass background checks in fewer than 10 days.

Petitioners challenged the application of California's full 10-day waiting period to persons who passed their background checks in less time and who already lawfully possess a firearm as confirmed in California's Automated Firearms System ("AFS"), who lawfully possess a firearm and a valid Certificate of Eligibility ("COE") to purchase a firearm, or who possess a valid Carry Concealed Weapon ("CCW") license. App. B2.¹ As to such persons, Petitioners argued that enforcing the full 10-day waiting period had no plausible justification and hence violates, *inter alia*, the Second Amendment.² Such persons, by definition, would have already passed their background checks and been found eligible to purchase a firearm. And persons who already own a firearm cannot be pre-

¹ As the case was litigated and decided in the district court, the latter two groups overlapped with the broader initial group of existing owners who promptly passed their background checks. The group of COE holders eventually was limited to those who already owned a firearm and thus need not be discussed separately at this stage. App. B85-B87. And while most CCW license holders can be expected already to own a firearm, to the extent they might not, they were analyzed as a separate low-risk category because that group already would have passed the rigorous requirements for obtaining a CCW license. App. B80-B85.

² Petitioners also raised a Fourteenth Amendment claim that was not reached by either the district or circuit court. App. B88. That claim is not at issue here.

vented from taking *impulsive* violent action by making them wait 10 days for a subsequent purchase.

3. The district court held a 3-day bench trial on Petitioners' claims. After hearing testimony, taking evidence, and full briefing, the court agreed with Petitioners that the challenged application of the waiting period violated the Second Amendment. App. B2-B3.

The court found that virtually all background checks are completed in less than the full 10-day period. App. A17; App. B48. It further found that 20% of background checks are automatically approved based on computerized searches confirming an applicant's eligibility to purchase a firearm. Such automatic approvals are generally completed in less than an hour. App. A17; App. B47.

As to purchasers who pass their background check in fewer than the full 10 days, the only non-frivolous justification offered by the State for depriving them of possession of the firearm for the full 10 days is to provide a cooling-off period in case the firearm is being purchased pursuant to some impulsive but transitory intent to commit violence (whether suicide or crime) that might be reconsidered during the period of delay.

Petitioners argued, however, that such rationale has no application to subsequent purchasers who already own a firearm and hence already have the means to act immediately on such supposedly transitory impulses to violence against themselves or others. And CCW license holders, having been deemed sufficiently trustworthy and stable to carry a concealed weapon, pose no demonstrable risk of such

rash behavior that would be mitigated by a cooling off period. Enforcement of the full 10-day waiting period as applied to such purchasers has no plausible or rational relation to the supposed purposes of the law.

Based on extensive findings of fact and conclusions of law, the district court determined that the application of the full 10-day waiting period in this case fell within the scope of the Second Amendment and was not a presumptively valid regulation. App. B3. After finding that all parties had standing and rejecting some largely frivolous and unsupported assertions by the State speculating about potential updates to a completed background check, App. B13-B20, B72-B74, the court turned to whether rigid application of the full waiting period in this case materially advanced the State's interest in preventing impulsive acts of violence or self-harm by providing a cooling-off period.

Having recognized that, for claims properly within the scope of the Second Amendment, "rational basis review is not to be used," App. B64 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 n. 27 (2008)), the district court analyzed the case using intermediate scrutiny.³

The court acknowledged that preventing suicide or violence was a legitimate government interest, so the only question remaining was whether application of the full waiting period after subsequent purchasers

³ Petitioner's preserved the argument that strict scrutiny should apply, but agreed that it was unnecessary to decide between intermediate and strict scrutiny given that California's application of its waiting period in this case could not survive any form of heightened scrutiny. App. B21, B70.

had cleared their background checks meaningfully advanced that interest. In the Ninth Circuit, the question often is framed as whether there is a “reasonable fit between the challenged regulation and the government’s asserted objective.” App. B65 (citing cases). The court noted, however, that to demonstrate such a “fit,” the challenged restriction “must not be substantially broader than necessary to achieve the government’s interest,” the government “cannot rely on ‘mere speculation or conjecture,’” and that a restriction “‘may not be sustained if it provides only ineffective or remote support for the government’s purpose,’ rather there must be an indication that the regulation will alleviate the asserted harms to a ‘material degree.’” App. B65 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

Turning to whether application of the full waiting period to subsequent purchasers and CCW license holders materially advanced the government’s cooling-off interest, the court concluded it did not.

Regarding whether the scope of the asserted problem – impulsive acts of violence with a newly and lawfully purchased firearm – aligned with the restriction imposed, the court found that “[n]o evidence has been submitted regarding current or historical California suicide statistics or ‘time to crime’ statistics,” which is “the elapsed time from a lawful sale of a firearm to the time of a crime committed with that firearm.” App. B50. And reviewing the proffered studies regarding firearm suicide attempts, the court found that suicidal thoughts were transitory and were acted upon within 24 hours or often within one hour. *Id.* One study suggested that for “‘a suicidal

person *who does not already own a handgun*, a delay in the purchase of one allows time for suicidal impulses to pass or diminish.’” App. B50 (emphasis added). The study did not address the length of delay needed to serve such a purpose. Ultimately, the court found that studies of the relationship between suicide and homicide rates and waiting period laws are generally considered “inconclusive,” did not find “statistically significant differences between treatment states and controls states * * * as to either homicide rates or suicide rates” for victims aged 21 to 55, and for individuals over the ages of 55 an observed reduction in gun suicide rates was “at least partially offset by an increase in non-gun suicides, which makes it less clear that the waiting period reduced overall suicides for those over age 55.” App. B50-B51.

In addition to the lack of evidence of a general problem involving impulse crimes or suicides occurring within 10 days of the application to purchase a lawful firearm, the court also observed that many supposed benefits from a waiting period would accrue in any event: “Because 80% of DROS applications are not auto-approved, a waiting period of at least 1-day will naturally occur because” the government will need to conduct further manual review. App. B74. And for those still inclined to impulsive violence, the court observed that if “a person already possesses a firearm, then that person will generally have access to that firearm and may commit impulsive acts of violence with it.” App. B75.

Based on its review of the studies and arguments proffered by the State, the court concluded that there “is no evidence that a ‘cooling off period,’ such as that

provided by the 10-day waiting period, prevents impulsive acts of violence by individuals who already possess a firearm.” *Id.*⁴

The court rejected the State’s imagined theories on how an existing gun owner might need a new gun to commit an impulsive act of violence or self-harm, noting that the State offered “no evidence” in support of its “unduly speculative” theory. App. B76 (citing *Edenfield*, 507 U.S. at 770-71). It thus reiterated its holding that there “has been no showing that applying the 10-day waiting period to all individuals who already possess a firearm will materially prevent impulsive acts of violence.” App. B76.⁵

⁴ The court rejected, as unsupported, the State’s speculation that “because some firearms are better suited for certain purposes than other firearms, a waiting period may prevent an impulsive act of violence with the new weapon.” The court noted that the only testimony offered in support of this speculation demonstrated, as the State’s witness admitted, that “any cooling off period created by the 10-day waiting period did not work.” No other examples were offered by the State. App. B75 n. 35.

⁵ Regarding purchases by the limited subset of CCW license holders who might not currently possess a firearm, the court made findings concerning the rigorous requirements for obtaining and keeping such a license. App. B57-B59. As to such highly vetted persons, the court found that there was no evidence regarding the incidence or timing of suicide attempts by such persons and no studies supported applying a 10-day waiting period “to individuals who must meet the type of requirements of a CCW license.” App. B81-83. The court held that the “nature and unique requirements of CCW licenses are such that it is unlikely that CCW license holders would engage in impulsive acts of violence.” App. B82. The court thus concluded that because the State has already determined that a CCW licensee “has demonstrated that he or she can be expected and trusted to carry a concealed handgun in public for 2 years, * * * [i]mposing

Having determined that application of the full 10-day waiting period to subsequent purchasers and CCW license holders did not reasonably or materially advance the State's claimed interests in a cooling-off period beyond the time required for a background check, the district court held that the waiting period, as applied, failed intermediate scrutiny and violated the Second Amendment. App. B84.⁶

4. The Ninth Circuit reversed and remanded with instructions to enter judgment for the defendant.

The court of appeals "assume[d], without deciding, that the regulation is within the scope of the [Second] Amendment and is not the type of regulation that must be considered presumptively valid." App. A20. The court of appeals then purported to apply intermediate scrutiny, claiming to have imported "the test for intermediate scrutiny from First Amendment cases" and listing two requirements of such scrutiny: "(1) the government's stated objective must be significant, substantial, or important; and (2) there must be a 'reasonable fit' between the challenged regulation and the asserted objective." App. A8. The court made no mention of the government's burden of proof to show such a fit, no mention that the challenged law must significantly, and not trivially, advance the government's interest, and no mention of the inadequacy of

the 10-day waiting period as a cooling off period on a CCW license holder is speculative and its effects appear remote at best." App. B83.

⁶ Because the Second Amendment claim was dispositive, the court did not need to reach the Fourteenth Amendment claim. App. B88.

mere speculation when it comes to satisfying the government's burden of proof. And, indeed, the court thereafter made no further pretense of applying anything resembling intermediate scrutiny.

Addressing the State's cooling-off period justification, the court of appeals merely cited the generic and inconclusive studies proffered by the State, claiming that such studies demonstrated the risk of suicide immediately following a firearm purchase and the supposedly beneficial effects of waiting periods on gun suicides among the elderly. App. A23. Regarding the district court's finding that such studies did not distinguish between first-time and subsequent purchasers, the court of appeals offered the non-sequitur that "the studies related to all purchasers." App. A23. It offered no explanation, much less evidence, suggesting that any of the supposed effects on suicide could be attributed to subsequent purchasers who already had the means to shoot themselves, as opposed to being entirely attributable to first-time purchasers who did not otherwise have such means until after the purchase. Rather than concern itself with the absence of actual evidence, the court cited to the supposedly "common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down." *Id.* It then asserted, without the slightest reasoning or proof, that "[t]his is no less true for a purchaser who already owns a weapon and wants another, than it is for a first time purchaser." *Id.*

The court noted the district court's conclusion "that a cooling-off period would not have any deterrent effect on crimes committed by subsequent pur-

chasers, because if they wanted to commit an impulsive act of violence, they already had the means to do so,” but then proceeded to invert the applicable burdens of proof. The court of appeals chided the district court for supposedly “assum[ing] that all subsequent purchasers who wish to purchase a weapon for criminal purposes already have an operable weapon suitable to do the job,” and suggested that an “individual who already owns a hunting rifle, for example, may want to purchase a larger capacity weapon that will do more damage when fired into a crowd. A 10-day cooling-off period would serve to discourage such conduct.” App. A23-A24.

The court identified no instance of such a scenario ever having happened, cited no testimony as to its likelihood, and gave no evidence as to why such a planned, as opposed to impulsive, desire to commit mass murder would be impacted in the slightest by an extra few days wait beyond that necessary to conduct a background check. The court of appeals likewise gave no deference to, nor made mention of, the district court’s many findings of fact that California’s AFS database was an accurate source of information regarding firearm ownership, that the State’s evidence linking gun purchases to imminent crime was inconclusive at best, that there was not a single example of a crime that would have been prevented by a 10-day waiting period, and that the studies regarding suicide among the elderly were of little value. App. B34-35, B49-B52, B74-B77

The court of appeals, having offered only speculation on how delaying delivery of a firearm to lawful subsequent purchasers might serve the State’s

claimed interests to an insignificant and unproven degree, then concluded, without apparent irony, that:

“The State is required to show only that the regulation ‘promotes a substantial government interest that would be achieved less effectively absent the regulation.’ *Fyock*, 779 F.3d at 1000 (citation and quotation marks omitted). The State has established that there is a reasonable fit between important safety objectives and the application of the [waiting period laws] to Plaintiffs in this case. The waiting period provides time not only for a background check, but also for a cooling-off period to deter violence resulting from impulsive purchases of firearms. The State has met its burden.

App. A25.

5. Petitioners sought rehearing or rehearing *en banc*, which the Ninth Circuit denied.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for a writ of certiorari because the decision below, contrary to the decisions of this Court, dilutes or ignores the intermediate scrutiny that is the minimum scrutiny applicable in Second Amendment challenges. And because such lax scrutiny appears to be the result of a concerted effort in the Ninth Circuit and elsewhere to circumvent this Court’s Second Amendment cases, this Court should exercise its supervisory power to ensure faithful, as opposed to obstructionist, application of those precedents.

I. The Decision Below Applies an Improperly Lenient Level of Constitutional Scrutiny.

This case offers this Court the opportunity to address the minimum level of constitutional scrutiny required in Second Amendment cases in a situation where the requirements of intermediate scrutiny and their application to the facts should be easy, yet nonetheless turned out wrong.

The as-applied challenge here was rejected by the court of appeals because the standards and burdens the Ninth Circuit applied were not even close to intermediate scrutiny as applied under the First Amendment or other constitutional provisions. Although the Ninth Circuit claimed it was applying such intermediate scrutiny, if we take that court at its word, its view of intermediate scrutiny conflicts with the standards applied by this Court and pretty much every other court to apply such scrutiny outside the Second Amendment context.

For example, in the First Amendment context, intermediate scrutiny requires that restrictions on commercial speech must be “tailored in a reasonable manner to serve a substantial state interest.” *Edenfield*, 507 U.S. at 767. But this Court has made abundantly clear that such “reasonable” tailoring requires a considerably closer fit than mere rational basis scrutiny, and requires evidence that the restriction directly and materially advances a *bona fide* state interest.

The test under intermediate scrutiny for whether a regulation is reasonably tailored to substantial state interests is “whether the challenged regulation advances these interests in a direct and material way,

and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served.” *Id.* Under the tailoring element of intermediate scrutiny, “the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.’” *Id.* at 770 (quoting *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980)). Furthermore, the government bears the burden of justifying its restriction on constitutional rights, and that “burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 507 U.S. at 770-71.

The district court below correctly applied the standards from *Edenfield* and held that the State’s evidence was deficient regarding the existence of any harm from the narrow group at issue here. The district court, as the finder of fact, rejected the State’s hypothesized harms and solutions as speculative, and hence inadequate under intermediate scrutiny. App. B49-B52, B74-B77, B81-B83, B87.

The Ninth Circuit, by contrast did exactly what this Court, and intermediate scrutiny, forbid: It relied on “evidence” that did not even remotely address the challenge at issue and speculated as to both the existence of risk and the benefits of the restriction as applied to subsequent purchasers and CCW licensees. Indeed, ignoring the district court’s factual findings, the Ninth Circuit offered only two incoherent responses. The first was that a study concerning sui-

cide among older purchasers of firearms reviewed all purchasers and hence its conclusions were valid as to the subgroup of subsequent purchasers as well. App. A23. The district court, however, noted that such studies provided little support even when taken at face value, and further held that any supposed effect did not distinguish between first-time and subsequent purchasers. It requires only the barest moment of reflection to recognize the flaw in the Ninth Circuit’s logic – all of the supposed increase in suicide rate could have come from first-time purchasers, and the inclusion of subsequent purchasers in the denominator tells us nothing about whether they are represented at all in the numerator.⁷

The Ninth Circuit’s second proffered response – the assertion that “waiting ten days *may* deter subsequent purchasers from buying new weapons that would be better suited for a heinous use,” App. A19 (emphasis added) – is the very definition of speculative. The district court found that there was no evidence at all providing time-to-crime data or supporting the supposed effectiveness of waiting periods in preventing “heinous” crimes. App. B50-B52. And it is difficult to imagine a subsequent purchaser needing a new and specialized weapon to commit suicide.

Even assuming, *arguendo*, that cooling-off periods might reduce impulsive acts of violence or self-harm, there is no evidence that a period of 10 days has any

⁷ For example, if 17-year-olds in general have an X-percent chance of becoming pregnant, the inclusion of 17-year-old boys in the denominator does not tell us that boys have a significant risk of becoming pregnant themselves.

marginal benefit over the shorter, but inevitable, wait for the 80% of purchasers not automatically, but eventually, clearing their background check. Furthermore, a person with a violent impulse who already has the means to implement that impulse will simply do so. If the person is instead planning an act of violence with sufficient forethought to purchase a subsequent weapon better suited for heinous use, that is premeditated, not impulsive, and there is no suggestion that waiting periods have any effect on such planned acts of violence.

This Court has held under intermediate scrutiny that restrictions on constitutional rights must be analyzed in their specific context, and “will depend upon the identity of the parties and the precise circumstances of the” protected activity. *Edenfield*, 507 U.S. at 774. Even where this Court has spoken of the general potential dangers of a protected activity, it has emphasized that such generalized risk does not warrant restrictions as to all persons. Instead, “a preventative rule” aimed at such generic hazards “was justified only in situations ‘inherently conducive to’” the specific dangers identified. *Id.* (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978)).

Similarly, in *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 185-95 (1999), this Court assumed the accuracy of a causal chain from casino advertising to the social ills resulting from increased gambling, but still found the government regulation failed intermediate scrutiny. Having ignored numerous confounding factors and its own inconsistent policies towards gambling, the govern-

ment failed to distinguish between the advertising it allowed and the advertising it restricted. Accordingly, it could not demonstrate that its policy had “directly and materially furthered the asserted interest.” 527 U.S. at 189.

Had the Ninth Circuit faithfully applied the correct standards of intermediate scrutiny, it could not have upheld the challenged applications of the waiting period laws in this case. Far from posing the same risk of impulsive violence as hypothesized for first-time firearm purchasers, subsequent purchasers and CCW licensees pose little or no risk, and certainly no demonstrated risk, of the harms the State seeks to reduce. Just as the regulators in *Edenfield* and *Greater New Orleans Broadcasting* failed to distinguish between general claims of harm and remedy, and specific evidence that the group being regulated posed a threat or would add to the solution, so too the State has failed here.

None of the government’s evidence distinguishes between first-time and subsequent purchasers or CCW licensees. The hypothesized danger being addressed – impulsive violence enabled by a new firearm purchase – on its face does not apply to those who already have a firearm, and there is nothing to suggest that such group or CCW holders pose even the slightest threat of such violent behavior. Likewise, the notion that a marginal increase in wait-time beyond that needed to clear a background check would have any impact on the incidence of such imagined harms is itself speculative and illogical. Where a purchaser has a transient impulse to commit violence to himself or others, and already has the means

to fulfill that impulse, there is no reason to imagine that a waiting period for an additional weapon will prevent or cause reconsideration of such impulsive action. Whatever the argument as to first-time buyers, the government's failure to justify its restrictions as to the distinct groups here, who pose little or no danger of the hypothesized harms, is fatal under intermediate scrutiny.⁸

This Court has rejected such inadequate proof and speculation under intermediate scrutiny. In *Edenfield*, the regulatory body presented “no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.” 507 U.S. at 771. The lack of comparative data from other States was significant in *Edenfield, id.*, and is likewise significant here. The vast majority of States do not have waiting period laws, and most of the existing waiting period laws are for fewer than 10 days. App. B27. Yet California offered no meaningful comparative data on the supposed danger from subsequent purchasers or CCW licensees or the supposed effectiveness of waiting periods as to that group. In short, there is no evidence that the harm alleged in this case is real, and no evidence that the challenged application of the full waiting period materially advances the State's alleged in-

⁸ Additionally, the fact that there are numerous exceptions to the 10-day waiting period – mostly for persons who already have access to firearms, App. B61 – cuts against the government's claim of reasonably advancing its interests by applying the full waiting period in the circumstances here. *Greater New Orleans Broadcasting*, 527 U.S. at 190

terests in a “‘direct and effective way.’” *Edenfield*, 507 U.S. at 773 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). Even accepting the Ninth Circuit’s speculation in its entirety, the vague possibility that an existing and previously law-abiding owner might seek an additional firearm to commit an impulsive act of violence, would seek to lawfully purchase such a weapon, would act on the impulse in fewer than 10 days, but would not use the firearm he already possessed and instead cool off and reconsider his intended crimes in the period between clearing the background check and the remainder of the 10-day wait, is preposterous. It certainly does not represent a real or meaningful danger or a significant advancement of the broader cooling-off interest. As the district court found, the State has not proffered a single instance from anywhere in the country where a lengthier waiting period for a subsequent purchaser would have had any positive effect at all.

Lacking sufficient evidence to satisfy actual intermediate scrutiny, the Ninth Circuit instead diluted the standard from whether a regulation directly and materially advances the proffered interest to whether the regulation merely “‘promotes a substantial government interest that would be achieved less effectively absent the regulation.’” App. A25 (quoting earlier Ninth Circuit case). That formulation is more like rational basis than intermediate scrutiny. Under intermediate scrutiny the State retains “the obligation to demonstrate that it is regulating [protected activity] in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that

problem.” *Edenfield*, 507 U.S. 776. The State cannot even come close to meeting that standard here.

If we assume that the Ninth Circuit believes its analysis here was in fact intermediate scrutiny, the legal standard applied in this case is a severe re-trenchment of such scrutiny as heretofore understood, conflicts with the articulation of such scrutiny by this and other courts, and poses a threat not merely to Second Amendment rights, but to First and Fourteenth Amendment rights as well. This Court should grant certiorari to resolve that conflict in the standards for intermediate scrutiny and to enforce the requirement under this Court’s Second Amendment cases that burdens on the right to keep arms are subject to more than rational basis scrutiny.

II. This Court Should Exercise Its Supervisory Authority to Cabin the Continuing Resistance to Its Second Amendment Rulings.

Although the prior section allows for the possibility that the Ninth Circuit genuinely thought it was applying intermediate scrutiny, even if it failed to recognize and apply the elements and burdens of such scrutiny, another possibility is that the court perfectly understood what intermediate scrutiny entails but refused to apply it here.

It is no secret that various lower courts, and the Ninth Circuit especially, are engaged in systematic resistance to this Court’s *Heller* and *McDonald* decisions. Several Justices of this Court have noted as much. See *Peruta v. California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., dissenting from denial of cert.) (“The approach taken by the *en banc* court is

indefensible, and the petition raises important questions that this Court should address.”; “The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”); *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (“We treat no other constitutional right so cavalierly”); *Friedman v. Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari) (“Because noncompliance with our Second Amendment precedents warrants this Court’s attention as much as any of our precedents, I would grant certiorari in this case.”); *cf. Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (GVR of State court opinion that gave essentially no respect to this Court’s decision in *Heller*); *id.* at 1030, 1033 (Alito, J., concurring) (“Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analysis defied *Heller*’s reasoning.”; “The lower court’s ill treatment of *Heller* cannot stand.”)

Judges on the Ninth Circuit itself likewise have recognized the disfavored treatment given to Second Amendment challenges in that court. *Silveira v. Lockyer*, 328 F.3d 567, 568-69 (2003) (Kozinski, J., dissenting from the denial of rehearing *en banc*) (“It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. * * * Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it’s using our power as

federal judges to constitutionalize our personal preferences.”), *cert. denied*, 540 U.S. 1046 (2003).

This case provides an obvious example of such judicial resistance and a clean and concise vehicle for this Court to set an example and reestablish the proper administration of justice in Second Amendment cases. As noted in the previous section, the Ninth Circuit, though purporting to apply intermediate scrutiny, did nothing of the sort. It requires no imagination to infer that such ill treatment of the Second Amendment was not merely an error in the legal standard used. Although this Court’s decision in *Edenfield* sets the baseline for intermediate scrutiny and was relied upon extensively by the district court, the Ninth Circuit does not cite or quote that case at all. Had it done so, it would have been impossible to maintain any pretense that it actually was engaging in intermediate scrutiny.

Further indication that the result in this case was not mere error, but instead active circumvention, is the Ninth Circuit’s utter disregard for the district court’s findings of fact. Rule 52(a)(6) “sets forth a ‘clear command’” that “does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court’s findings unless clearly erroneous.” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015) (citations omitted). Put simply, “when reviewing the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.” *Id.* at 837 (citations omitted).

When a district court rules *against* a Second Amendment challenge, the Ninth Circuit is quick to discuss the lower court's findings of fact, to defer to such findings, and to conclude that it "cannot say that the district court's weighing of the evidence or credibility determinations were clearly erroneous, and we decline to substitute our own discretion for that of the district court." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000-01 (9th Cir. 2015).

In this case, by contrast, when reviewing a disfavored decision sustaining a Second Amendment challenge, such deference and limited review were not even mentioned, much less applied. Rather, the Ninth Circuit derided express findings by the district court as mere assumptions it could ignore, and substituted its own speculative assessment of the potential harms for the district court's findings that the State had failed to meet its burden of proof. The sheer irregularity of having abandoned both the standards for intermediate scrutiny and the standard of review of trial findings provides a strong inference that the decision below was merely cover for a preordained outcome rather than an application of the rule of law and this Court's precedents.

The Ninth Circuit's shabby treatment of Second Amendment claims here is nothing new. Many of the Second Amendment cert. petitions coming to this Court arise from the Ninth Circuit and have provoked strong dissents from denial of cert. *See supra*, at 21-22. And when, by some happenstance, a Second Amendment challenge succeeds before a panel, the *en banc* Ninth Circuit is quick to dispose of the outlier. *See Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th

Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 1995 (2017). That the Ninth Circuit and many other courts are openly hostile to the Second Amendment and unwilling faithfully to apply this Court's cases on the issue, is hardly news to this Court. Indeed, such undisguised circumvention already has inspired a unanimous GVR in a case from Massachusetts. *Caetano*, 136 S. Ct. at 1028. More, however, is needed. The Second Amendment is meaningless if restrictions will be covered by that Amendment, but the level of scrutiny and the standard of review are rigged.

Petitioners recognize this Court's seeming reluctance to engage further in the contentious development of Second Amendment jurisprudence. The question in this case is whether it is now time to overcome that reluctance and whether this case is a good vehicle for reestablishing the ground rules for Second Amendment cases.

First, Petitioners respectfully suggest that the time has come to put an end to the mass resistance among the courts of appeals to *Heller* and *McDonald*. Whatever the institutional and systematic harms that come from lingering circuit splits, they pale in comparison to those caused by active non-compliance with, and circumvention of, this Court's precedents. If the credibility and fairness of the legal system is diminished by divergent – though good-faith – legal standards and results that vary by circuit, surely credibility and fairness are at their lowest when various courts of appeals decide that their own views trump Supreme Court precedent.

Nor does it matter that members of this Court might continue to disagree on the particular merits or

standards to be applied in various Second Amendment cases; whatever this Court eventually decides under the Second Amendment, the lower courts must be obliged to follow. The behavior of the Ninth Circuit and other obstructionist courts systematically undermines the credibility of the entire legal system and feeds the view that the courts are engaged in politics, not the law. The Ninth Circuit in this and other Second Amendment cases is not neutrally calling balls and strikes, it is the proverbial hometown umpire. If judicial credibility and the rule of law mean anything, this trend is a direct and continuing threat to such interests. This Court has waited long enough on the lower courts, and should now reassert that the rule of law applies to the Second Amendment as much as to the First, Fourth, and Fourteenth Amendments.

Second, this case provides a good vehicle for clarifying and enforcing the most basic notions of constitutional scrutiny and faithfulness to this Court's cases. The facts are straightforward and not genuinely subject to dispute. The State's burden of proof, the bench trial before the district court, and the appellate standard of review make application of the law to such facts straight-forward. And the particular application of the full 10-day waiting period to firearms purchasers who pass their background checks and already possess another firearm or a CCW license involves no meaningful risk to public safety. In short, the erroneous legal analysis below is open and notorious, the facts are limited and straightforward, and the risk of adverse public consequences are effectively non-existent. This case thus has the potential to al-

low this Court to focus on the law, rather than on contentious public-policy issues, and might allow greater agreement regarding uniform and genuine standards of constitutional scrutiny and respect for this Court's precedents.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

- A. Ninth Circuit Opinion, Feb. 9, 2016A1-A33
- B. District Court for the Eastern
District of California, Findings of
Fact and Conclusions of Law,
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- C. Ninth Circuit Denial of Rehearing and
Rehearing *En Banc*, April 4, 2017C1-C2

APPENDIX A

843 F.3d 816 *; 2016 U.S. App. LEXIS 22184 **

Silvester v. Harris

United States Court of Appeals
for the Ninth Circuit
December 14, 2016, Filed

No. 14-16840

Before: Sidney R. Thomas, Chief Judge, and Mary M. Schroeder and Jacqueline H. Nguyen, Circuit Judges. THOMAS, Chief Judge, concurring.

[*818] SCHROEDER, Circuit Judge:

INTRODUCTION

California has extensive laws regulating the sale and purchase of firearms. The State now appeals the district court's judgment in favor of Plaintiffs in their Second Amendment challenge to the State's law establishing a 10-day waiting period for all lawful purchases of guns.

This case is a challenge to the application of the full 10-day waiting period to those purchasers who have previously purchased a firearm or have a permit to carry a concealed weapon, and who clear a background check in less than ten days. It is not a blanket

(A1)

challenge to the waiting period itself. It is not a challenge to the requirement that the California Bureau of Firearms ("BOF") approve of the purchase of any firearm. It is not a claim that [*819] persons have been denied firearms who should have been permitted to purchase them. Plaintiffs do not seek instant gratification of their desire to purchase a weapon, but they do seek gratification as soon as they have passed [**5] the BOF background check.

The district court agreed with Plaintiffs that having to wait the incremental period between the time of approval of the purchase and receipt of the weapon violated Plaintiffs' Second Amendment rights. The court rejected the State's contention that a 10-day "cooling off" period was a justifiable safety precaution for all purchasers of firearms, regardless of whether they already lawfully possessed a firearm or a permit to carry one. The court also rejected the State's argument that a waiting period, in existence in California in some form for nearly a century, was the type of long accepted safety regulation considered to be presumptively lawful by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

Because we agree with the State that the 10-day waiting period is a reasonable safety precaution for all purchasers of firearms and need not be suspended once a purchaser has been approved, we reverse the district court's judgment. We do not need to decide whether the regulation is sufficiently longstanding to be presumed lawful. Applying intermediate scrutiny analysis, we hold that the law does not violate the

Second Amendment rights of these Plaintiffs, because the ten day wait is a reasonable precaution for the purchase [**6] of a second or third weapon, as well as for a first purchase.

We begin our Second Amendment analysis with the legal background. It reflects that, beginning with the Supreme Court's watershed decision in *Heller*, federal courts have had to scrutinize a variety of state and local regulations of firearms, and that our court, along with others, has developed a body of law applying intermediate scrutiny to regulations falling within the scope of the Second Amendment's protections.

LEGAL BACKGROUND

I. The Supreme Court's Decision in *Heller*

The Second Amendment provides: "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. The seminal case interpreting the Second Amendment in this century is *Heller*, where the Supreme Court confronted statutes effectively prohibiting operable firearms in the home. 554 U.S. at 628.

In *Heller*, the plaintiff challenged District of Columbia statutes that banned the possession of all handguns, and required that any lawful firearm stored in the home, such as a hunting rifle, be "disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* After conducting a lengthy historical inquiry into the original meaning of the Second Amendment, the Court announced [**7] for the first

time that the Second Amendment secured an "individual right to keep and bear arms." *Id.* at 595. The Court determined that the right of self defense in the home is central to the purpose of the Second Amendment, while cautioning that the right preserved by the Second Amendment "is not unlimited." *Id.* at 626-28.

Heller gave us the framework for addressing Second Amendment challenges. First, *Heller* evaluated whether the firearms regulations fell within "the historical understanding of the scope of the [Second Amendment] [*820] right." *Id.* at 625. The Court indicated that determining the scope of the Second Amendment's protections requires a textual and historical analysis of the Amendment. *Id.* at 576-605.

The Court also recognized that the Second Amendment does not preclude certain "longstanding" provisions, *id.* at 626-27, which it termed "presumptively lawful regulatory measures," *id.* at 627 n.26. The Court provided examples of such presumptively lawful regulations that it said included, but were not limited to, "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

Guided by its historical inquiry, the Court struck down District of Columbia statutes that banned [**8] handgun possession and required all lawful firearms in homes to be unloaded and disassembled or locked.

Id. at 629-30. The Court rejected the government's position that because the Amendment begins with a reference to the need for a militia, the Second Amendment protects only the right to bear arms for military purposes.

The four dissenting Justices relied on *United States v. Miller*, where the Court made reference to the military and civilian purposes of the Amendment. *Id.* at 637-38 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)). The Court there upheld a regulation prohibiting the civilian possession of short-barreled shotguns. *Miller*, 307 U.S. at 178. Under the dissent's reading of *Miller*, the Second Amendment "protects the right to keep and bear arms for certain military purposes, but [] it does not curtail the Legislature's power to regulate the non-military use and ownership of weapons." *Heller*, 554 U.S. at 637. The *Heller* majority interpreted *Miller* as limiting the type of weapon eligible for Second Amendment protection, not as restricting the Amendment to military purposes. *Id.* at 622. "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Id.* at 623.

The core of the *Heller* analysis is its conclusion that the Second Amendment protects the right to self defense in the home. The [**9] Court said that the home is "where the need for defense of self, family, and property is most acute," and thus, the Second Amendment must protect private firearms ownership. *Id.* at 628. The *Heller* Court held that, under

any level of scrutiny applicable to enumerated constitutional rights, the ban on handgun possession "would fail constitutional muster." *Id.* at 629. Notably, in so doing, the Court expressly left for future evaluation the precise level of scrutiny to be applied to laws relating to Second Amendment rights. *Id.* at 626-27, 634-35. The Court did, however, reject a rational basis standard of review, thus signaling that courts must at least apply intermediate scrutiny. *Id.* at 628 n.27.

We therefore turn to our circuit law that has developed during the eight years since *Heller*.

II. Ninth Circuit Law Since *Heller*

A. The two-step inquiry for Second Amendment cases

Our court, along with the majority of our sister circuits, has adopted a two-step inquiry in deciding Second Amendment [*821] cases: first, the court asks whether the challenged law burdens conduct protected by the Second Amendment; and if so, the court must then apply the appropriate level of scrutiny. Our two leading cases in this circuit are *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), and *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). In *Chovan*, we collected cases from other circuits utilizing a similar two-step inquiry. 735 F.3d at 1134-37.

The analysis flows from [**10] *Heller*'s identification of the Amendment's core purpose of self defense in the home and *Heller*'s charge to the lower courts to

evaluate the appropriate level of review, as well as the scope of the Amendment's protections. We stressed in *Chovan* that the Supreme Court did not define the scope of the Second Amendment protection, but it "did establish that the individual right guaranteed by the Amendment is 'not unlimited.'" *Id.* at 1133 (quoting *Heller*, 554 U.S. at 626).

Under our case law, the court in the first step asks if the challenged law burdens conduct protected by the Second Amendment, based on a "historical understanding of the scope of the right." *Heller*, 554 U.S. at 625. Whether the challenged law falls outside the scope of the Amendment involves examining whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood. *Id.* Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis. See *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). A challenged law may also fall within the limited category of "presumptively lawful regulatory measures" identified in *Heller*. *Jackson*, 746 F.3d at 960; see also *Fyock v. Sunnyvale*, 779 F.3d 991, 996-97 (9th Cir. 2015).

If the regulation is subject to Second Amendment protection (*i.e.*, the regulation [**11] is neither outside the historical scope of the Second Amendment, nor presumptively lawful), the court then proceeds to the second step of the inquiry to determine the appropriate level of scrutiny to apply. *Jackson*, 746 F.3d

at 960. In ascertaining the proper level of scrutiny, the court must consider: (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right. *Id.* at 960-61.

The result is a sliding scale. A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. *Id.* at 961. That is what was involved in *Heller*. 554 U.S. at 628-29. A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. *See Chovan*, 735 F.3d at 1138. Otherwise, intermediate scrutiny is appropriate. "[I]f a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right," the court may apply intermediate scrutiny. *Jackson*, 746 F.3d at 961.

We have imported the test for intermediate scrutiny from First Amendment cases. *See id.* at 965; *Chovan*, 735 F.3d at 1138-39. To uphold a regulation under intermediate scrutiny, we have identified two requirements: (1) the government's stated objective must be significant, substantial, or important; **[**12]** and (2) there must be a "reasonable fit" between the challenged **[*822]** regulation and the asserted objective. *Chovan*, 735 F.3d at 1139.

B. Cases applying intermediate scrutiny

This court has applied intermediate scrutiny in a series of cases since *Heller* to uphold various firearms regulations. See *Fyock*, 779 F.3d at 1000-01; *Jackson*, 746 F.3d at 966, 970; *Chovan*, 735 F.3d at 1139. The first was *Chovan* where we considered a regulation prohibiting domestic violence misdemeanants from possessing firearms. We held that the law did not violate the Second Amendment because the prohibition was substantially related to the important government interest of preventing domestic gun violence. 735 F.3d at 1141.

Then in *Jackson*, we affirmed the district court's denial of a preliminary injunction in which plaintiffs sought to enjoin a San Francisco ordinance requiring handguns inside the home to be stored in locked containers or disabled with a trigger lock when not being carried on the person. 746 F.3d at 958. We held that this was appropriately tailored to fit the city's interest of reducing the risk of firearm injury and death in the home, and thus, survived intermediate scrutiny. *Id.* at 966. We concluded that the regulation did not prevent citizens from using firearms to defend themselves in the home, but rather indirectly burdened handgun use by requiring an [**13] individual to retrieve a weapon from a locked safe or removing a trigger lock. *Id.* We distinguished that regulation from the total ban in *Heller* because it only burdened the "manner in which persons may exercise their Second Amendment rights." *Id.* at 964 (quoting *Chovan*, 735 F.3d at 1138).

Jackson also involved a challenge to a law prohibiting the sale of hollow-point ammunition. *Id.* at 967. We applied intermediate scrutiny and found that the regulation was a reasonable fit with the objective of reducing the "lethality" of bullets because it targeted only the sale of a class of bullets that exacerbates the harmful effect of gun-related injuries. *Id.* at 970.

In *Fyock*, we affirmed the district court's denial of a preliminary injunction to enjoin a city ordinance restricting possession of large-capacity magazines. 779 F.3d at 994. We denied the injunction on the ground that the challenge to the regulation was not likely to succeed on the merits. We concluded that the ordinance would likely survive intermediate scrutiny because the city presented sufficient evidence to show that the ordinance was substantially related to the compelling government interest of public safety. *Id.* at 1000-01.

While these cases all upheld regulations within the scope of the Amendment because they did not severely **[**14]** burden the exercise of rights, this court, very recently, sitting en banc, looked to whether a regulation was outside the scope of the Second Amendment. In *Peruta*, we considered California's statutory scheme regulating conceal carry permits. 824 F.3d at 924. We held that the Second Amendment does not protect the right to carry a concealed weapon in public. *Id.* at 939. Applying an exhaustive historical analysis, we concluded that the carrying of concealed weapons outside the home had never been acceptable and was therefore beyond the scope of the Second Amendment's protections. *Id.* We stressed

that *Heller* put limits on the scope of the Amendment and had expressly observed that the Second Amendment has not generally been understood to protect the right to carry concealed weapons. *Id.* at 928 (citing *Heller*, 554 U.S. at 626-27).

A concurrence by three judges agreed, but additionally came to an alternative conclusion that if the regulation was within [*823] the scope of the Second Amendment, the regulation would survive intermediate scrutiny. *Id.* at 942 (Graber, J., concurring). (The majority agreed with this analysis, though found it unnecessary to reach the issue. *Id.*)

Our intermediate scrutiny analysis is in line with that of other circuits. They have applied similar intermediate scrutiny to uphold firearms regulations within the scope of the [**15] Second Amendment. *See Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (holding that a regulation requiring individuals seeking a permit to carry a handgun in public was longstanding and presumptively lawful, and that it withstands intermediate scrutiny); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (applying intermediate scrutiny, upholding a Maryland statute that required an applicant for a permit to carry a handgun outside the home to provide a substantial reason for doing so); *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013) (upholding, under intermediate scrutiny, Texas's statutory scheme barring 18-to-20-year-olds from carrying handguns in public); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (applying intermediate scrutiny in upholding New York legislation that prevented individuals from obtaining a concealed carry

license, except individuals who demonstrated a special need for self protection); *Heller v. District of Columbia*, 670 F.3d 1244, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (finding a prohibition on assault weapons passed muster under intermediate scrutiny review); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (applying intermediate scrutiny to uphold a statute prohibiting drug users from firearm possession).

There is accordingly near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate. Most circuits also appear to apply a two-step test similar to ours. The case law in our circuit and our sister circuits [**16] thus clearly favors the application of intermediate scrutiny in evaluating the constitutionality of firearms regulations, so long as the regulation burdens to some extent conduct protected by the Second Amendment. Critical to that analysis is identifying an important legislative objective and determining whether the regulation reasonably fits with the objective. We therefore turn to the history and operation of the California law at issue in this case.

BACKGROUND OF THIS LITIGATION

I. History and Purpose of California's Waiting Period Laws

California has had some kind of waiting period statute for firearm purchases continuously since 1923. As the various statutory provisions evolved, the purposes of the waiting period have become clearer: to allow sufficient time for law enforcement to complete a

background check, and also to provide a "cooling off" period (*i.e.*, a period in which weapons purchasers may reconsider, particularly when an impulsive act of violence or self harm may be contemplated). In adopting the most recent provision, enacted in 1996, the Legislature expressly identified its concern with the impulsive use of handguns as a threat to public safety.

California's first waiting period law ("WPL") **[**17]** barred delivery of a pistol, revolver, or concealable firearm on the day of purchase. This 1923 law also prohibited felons from owning or possessing a firearm and imposed a corresponding restriction on selling guns to such persons. Law of June 13, 1923, ch. 339 §§ 2, 10, 1923 Cal. Laws 695, 696. The 1923 law also created a weapon recording system, the Dealer Record of Sale ("DROS"). The law required **[*824]** dealers to obtain identifying information about purchasers and mail a form on the day of the sale to the local police or county clerk to be recorded. The system continues to this day but in electronic form.

In 1955, the California Legislature extended the waiting period to three days, and in 1965, to five days. The legislative history indicates that the latter change was made to allow sufficient time for the California Department of Justice ("DOJ") and law enforcement to complete a background check. The 3-day waiting period was not enough to run an adequate background check. "Five days [was therefore] suggested as a more useful waiting period." Letter from Anthony C. Beilenson, Member, California Assembly, to Edmund G. Brown, Governor, California (June 30,

1965); *see* Letter from Charles A. Barrett, **[**18]** Assistant Attorney General, to Edmund G. Brown, Governor, California (June 24, 1965). In 1975, the California Legislature extended the waiting period to fifteen days. The legislative history indicates that the purpose of this extension was to allow more time for more extensive background checks. Cal. S. Comm. on the Judiciary, Assemb. B. 1441, 1975-76 Reg. Sess. (Cal. 1975).

As the length of the waiting period expanded to permit more extensive background checks, the applicability of the law expanded as well. Before 1991, the WPLs applied only to small arms. In 1991, California expanded the waiting period to cover all firearms.

In 1996, the California BOF switched to an electronic database system, which allowed for faster processing of background checks. This resulted in the reduction of the waiting period from fifteen days to the current ten days; the change was accompanied by a legislative explanation of the reasons for WPLs with special reference to handguns. The 1996 legislative history spelled out two justifications for WPLs: "One is the need to allow time for the [California] Department of Justice to do background checks. Another is the desire to provide a 'cooling off' period, **[**19]** especially for handgun sales." Cal. S. Comm. on Crim. Pro., 17 S. B. 671, 1995-96 Reg. Sess. 2099-0051 (Cal. 1995). The legislature thus intended to prevent immediate access in order to reduce impulsive purchases of handguns for violent ends. This is understandable, since human nature is such that an individual may

not act on violent impulses if provided with a period of time to calm down.

The law has remained the same since 1996. Its history demonstrates that the California Legislature has, since 1923, required potential purchasers to wait for some period of time before taking possession of a firearm. The amount of time a purchaser has had to wait has fluctuated, mainly because of the nature of the background check process, but the legislative purpose has always been to allow enough time for background checks. The Legislature made clear in 1996, that it was additionally concerned about the impulsive use of handguns. It thus emphasized that a waiting period also serves as a cooling-off period.

The essence of Plaintiffs' claim is that they are entitled to possession of guns they purchase as soon as the background check is completed. It is therefore important to understand how the California **[**20]** background check system operates. We turn to that subject.

II. The California Background Check System

Citizens who want to purchase a firearm (and do not fall into one of the law's eighteen exemptions, including law enforcement) must pass a background check to show that they do not fall into one of the **[*825]** prohibited classes. The background check begins with the completion and submission of an application form that the gun dealer electronically submits to the California DOJ. The form contains information about the prospective purchaser, the firearm, and the dealership.

The California DOJ maintains the Consolidated Firearms Information System ("CFIS"), an automated system that performs the electronic part of the background check process, called the Basic Firearms Eligibility Check ("BFEC"): It processes the application by sending inquiries to other electronic databases. The BFEC first queries California's Department of Motor Vehicles ("DMV") database, to ensure the purchaser's identifying information is valid. Next, the BFEC checks the Automated Firearms System ("AFS") database to determine whether the firearm has been reported lost or stolen. AFS is a leads database, primarily generated through [**21] DROS and police reports, used by law enforcement to identify individuals who may possess a firearm.

If the application passes the DMV and AFS checks, an eligibility check begins. Under California law, a person can lawfully purchase only one handgun in a 30-day period. Cal. Penal Code § 27535. CFIS queries its own records to make sure that the purchaser has not purchased another handgun in the prior thirty days. Next, the BFEC checks a series of state and federal criminal and mental-health databases to confirm that the purchaser is not prohibited from purchasing firearms under state or federal law.

If the application generates any "hits" or "matches" in the background check process, it is sorted for manual review by a California DOJ analyst. Approximately 80 percent of applicants require a manual review. The California DOJ has the authority to delay the delivery of a firearm for up to thirty days in order to complete the background check. *See id.* at § 28220(f).

If the application passes through each of these steps without a "hit" showing that the purchaser may be prohibited, then the application is automatically approved and the background check is complete. Approximately 20 percent of applications are automatically approved, [**22] and the application process is generally completed in less than ten days for all applicants.

III. Proceedings in District Court

In December 2011, Plaintiffs, two individuals, Jeff Silvester and Brandon Combs; and two firearm-rights organizations, the Calguns Foundation, Inc. and the Second Amendment Foundation, Inc., initiated the present lawsuit in federal district court. Plaintiffs challenged the full 10-day waiting period imposed by California Penal Code §§ 26815 and 27540, as applied to three classes, termed "subsequent purchasers," all of whom likely already possessed a gun.

The first class of subsequent purchasers consisted of individuals with firearms listed in the AFS database. AFS is not a gun registry. AFS receives its information from a variety of sources, including DROS records, voluntary reports from people who have obtained a firearm, and law enforcement reports. The database reflects California DOJ's best available information about who currently owns a firearm.

The second class of subsequent purchasers consisted of individuals who possess a valid license to carry a concealed weapon ("CCW"). A CCW permit is valid for two years. *Id.* at § 26220(a).

The third class was a subset of the first: it consisted of individuals identified in AFS [**23] who also possess a "certificate of eligibility" ("COE"), issued by the California DOJ. Such a certificate confirms a person's eligibility [*826] to lawfully possess and/or purchase firearms under state and federal law. *Id.* at § 26710; 11 Cal. Code Regs. § 4031(g). A COE is valid for one year that principally concerned how the California system works. The operation of the system is not disputed on appeal, although the parties dispute the reliability of the AFS system. Plaintiffs argue that AFS is a reliable source for identifying individuals who possess firearms because law enforcement officers view AFS to be reliable to identify who already possesses a gun. The State contends that AFS cannot be relied upon to identify individuals who own guns because AFS is not a gun registry but rather a leads database used by law enforcement to identify individuals who may possess a gun. We do not regard the dispute to be material because the legal issues can be decided on the assumption that Plaintiffs are justified in relying on the accuracy of the system.

The district court applied intermediate scrutiny since it found that the full 10-day waiting period burdened, to some extent, Second Amendment rights. It also recognized [**24] that the State has important interests in thorough background checks to make sure that firearms stay out of the hands of prohibited individuals. The court further noted the State's interest in providing a cooling-off period in order to hinder impulsive acts of violence or self injury using firearms.

The court held, however, that while the State's objectives of public safety and reducing gun violence are legitimate, those interests were not furthered by enforcing a 10-day waiting period for subsequent purchasers who pass the background check in less time. In other words, the court found that for these Plaintiffs, there was no "reasonable fit" between the waiting period and the safety objective. The court's theory was that if a subsequent purchaser already owned a gun, then the purchaser could use that gun to commit impulsive acts of violence or self harm. Thus, the court reasoned that there was no justification to require subsequent purchasers to wait beyond a background check approval before taking possession of a firearm.

The State had contended that the cooling-off period as applied to Plaintiffs is reasonably suited to a safety objective; waiting ten days may deter subsequent purchasers [**25] from buying new weapons that would be better suited for a heinous use. The district court dismissed the State's argument. The court thereby essentially discounted the dangers inherent in the proliferation of guns, including guns suitable only for use to injure others, such as Saturday night specials or large-capacity guns that have been used in mass shootings. The district court entered judgment for Plaintiffs.

IV. This Appeal

The State appeals. It contends that the WPLs, as applied to Plaintiffs, must be upheld under all three legal theories our cases have discussed. First, the State

argues that the WPLs fall outside the scope of the Second Amendment because during the founding era, WPLs would have been accepted and understood to be permissible. The State alternatively argues that the WPLs do not violate the Second Amendment because they fall within several categories of "presumptively lawful" regulations under *Heller*. Finally, the State contends that the WPLs survive intermediate scrutiny because they reasonably fit with the important government interests of public safety and reducing gun violence. We hold that the State must prevail under the proper application of intermediate scrutiny analysis. We assume, [*827] without [**26] deciding, that the regulation is within the scope of the Amendment and is not the type of regulation that must be considered presumptively valid.

ANALYSIS

It may be surprising that there has been no case law since *Heller* discussing the validity of firearm WPLs, and that this is therefore a case of first impression. The issue in this case is narrow, however, because it concerns whether California's 10-day wait to take possession of a firearm violates Second Amendment rights when applied to subsequent purchasers who pass the background check in less than ten days.

We apply intermediate scrutiny when a challenged regulation does not place a substantial burden on Second Amendment rights. *Jackson*, 746 F.3d at 961. The burden of the 10-day waiting period here, requiring an applicant to wait ten days before taking possession of the firearm, is less than the burden im-

posed by contested regulations in other Ninth Circuit cases applying intermediate scrutiny. *See, e.g., Fyock*, 779 F.3d 991; *Jackson*, 746 F.3d 953; *Chovan*, 735 F.3d 1127. This court has explained that laws which regulate only the "manner in which persons may exercise their Second Amendment rights" are less burdensome than those which bar firearm possession completely. *Chovan*, 735 F.3d at 1138.

The actual effect of the WPLs on Plaintiffs is very small. The contested application of the regulation [**27] to Plaintiffs simply requires them to wait the incremental portion of the waiting period that extends beyond completion of the background check. The regulation does not prevent, restrict, or place any conditions on how guns are stored or used after a purchaser takes possession. The WPLs do not approach the impact of the regulation in *Jackson* that required firearms to be stored in locked containers or disabled with a trigger lock. 746 F.3d at 963. The waiting period does not prevent any individuals from owning a firearm, as did the regulation in *Chovan*. 735 F.3d at 1139.

There is, moreover, nothing new in having to wait for the delivery of a weapon. Before the age of superstores and superhighways, most folks could not expect to take possession of a firearm immediately upon deciding to purchase one. As a purely practical matter, delivery took time. Our 18th and 19th century forebears knew nothing about electronic transmissions. Delays of a week or more were not the product of governmental regulations, but such delays had to be routinely accepted as part of doing business.

It therefore cannot be said that the regulation places a substantial burden on a Second Amendment right. Intermediate scrutiny is appropriate. Accordingly, we proceed to **[**28]** apply the two-step analysis of intermediate scrutiny that looks first to the government's objectives in enacting the regulation and second to whether it is reasonably suited to achieve those objectives. Jackson, 746 F.3d at 965.

From the beginning, the waiting period in California has had the objective of promoting safety and reducing gun violence. The parties agree that these objectives are important. The first step is undisputedly satisfied.

The parties dispute, however, whether the WPLs reasonably fit with the stated objectives. The test is not a strict one. We have said that "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Id.* at 969. Instead, it requires only that the law be "substantially related to the important government interest of reducing firearm-related deaths and injuries." *Id.* at 966. **[*828]** The district court recognized that some waiting period was necessary for background checks, but held that the full waiting period served no further legislative purpose as applied to subsequent purchasers. We cannot agree. In enacting the present statute, the Legislature said that the WPLs "provide a 'cooling-off' period, especially for handgun sales." The legislation coincided historically **[**29]** with increased national concern over the prevalence of inexpensive handguns leading to crime and violence. In fact, the following year, the Legislature introduced the Handgun Safety

Standard Act of 1997 in response to the proliferation of cheap handguns, which the California DOJ said, at the time, were "three times more likely to be associated with criminal activity than any other type of weapon." Assemb. B. 488, 1997-98 Reg. Sess. (Cal. 1997).

The State, in the district court, relied on studies showing that a cooling-off period may prevent or reduce impulsive acts of gun violence or self harm. One study confirmed that firearm purchasers face the greatest risk of suicide immediately after purchase, but the risk declines after one week. Another found that WPLs correlate to reductions in suicides among the elderly. The district court discounted these studies, saying that the studies did not focus on subsequent purchasers. But the studies related to all purchasers. They confirm the common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down. This is no less true for a purchaser who already owns a weapon and wants **[**30]** another, than it is for a first time purchaser.

The district court reasoned that a cooling-off period would not have any deterrent effect on crimes committed by subsequent purchasers, because if they wanted to commit an impulsive act of violence, they already had the means to do so. This assumes that all subsequent purchasers who wish to purchase a weapon for criminal purposes already have an operable weapon suitable to do the job.

The district court's assumption is not warranted. An individual who already owns a hunting rifle, for example, may want to purchase a larger capacity weapon that will do more damage when fired into a crowd. A 10-day cooling-off period would serve to discourage such conduct and would impose no serious burden on the core Second Amendment right of defense of the home identified in *Heller*. 554 U.S. at 628.

The thrust of the Plaintiffs' argument on appeal is similar. They contend that once a subsequent purchaser has passed the background check, and it is determined that there is no reason why the purchase should be prohibited, then there is no reason to delay the purchase any further. They therefore contend that the waiting period is overinclusive and applies to more people than it should.

Their position [**31] in this regard is very similar to the argument we rejected in *Jackson*. We there upheld a regulation requiring handguns to be stored in locked containers or disabled with a trigger lock when not carried on the person. *Jackson*, 764 F.3d at 969. Plaintiffs had argued that because a principal purpose of the law was to prevent access to weapons by children and other unintended users, the law was too broad and should not apply when there was little risk of unauthorized access, as, for example, when the gun owner lived alone. *Id.* at 966.

We upheld the regulation because the safety interests that the government sought to protect were broader than preventing unauthorized access. The interests extended to reducing suicides and deterring domestic

violence on the part of authorized [*829] users. *Id.* We said, "San Francisco has asserted important interests that are broader than preventing children or unauthorized users from using the firearms, including an interest in preventing firearms from being stolen and in reducing the number of handgun-related suicides and deadly domestic violence incidents." *Id.*

The State's reasons for the WPLs here, like the reasons for the storage protections in *Jackson*, are broader than Plaintiffs are willing [**32] to recognize. The waiting period provides time not only for background checks, but for the purchaser to reflect on what he or she is doing, and, perhaps, for second thoughts that might prevent gun violence.

Thus the waiting period, as applied to these Plaintiffs, and the safety storage precautions, as applied to the plaintiffs in *Jackson*, have a similar effect. Their purpose is to promote public safety. Their effect is to require individuals to stop and think before being able to use a firearm.

The State is required to show only that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 1000 (citation and quotation marks omitted). The State has established that there is a reasonable fit between important safety objectives and the application of the WPLs to Plaintiffs in this case. The waiting period provides time not only for a background check, but also for a cooling-off period to deter violence resulting from impulsive purchases of firearms. The State has met its burden.

CONCLUSION

The judgment of the district court is reversed and the matter is remanded for the entry of judgment in favor of the State.

Costs are awarded [**33] to the State.

REVERSED and REMANDED.

THOMAS, Chief Judge, concurring:

I agree entirely with, and concur in, the majority opinion. I write separately, however, because the challenge to California's ten-day waiting period can be resolved at step one of our Second Amendment jurisprudence. As a longstanding qualification on the commercial sale of arms under *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), a ten-day waiting period is presumptively lawful. Therefore, it is unnecessary to proceed to the second step intermediate scrutiny examination of the law.

Heller and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), clarified our understanding of the protections and applicability of the Second Amendment, but left examinations of specific regulations to the future, noting that the right to keep and bear arms is "not unlimited." *Heller*, 554 U.S. at 595, 626. As the majority explains, we have adopted a two-step inquiry to analyze Second Amendment challenges under *Heller*. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); Majority Op. 9. At step one, we ask

"whether the challenged law burdens conduct protected by the Second Amendment," and if it does, we proceed to step two and "apply an appropriate level of scrutiny." *Id.* "To determine whether a challenged law falls outside the historical scope of the Second Amendment, we ask whether the regulation is one of the presumptively lawful regulatory measures identified in *Heller* or whether the record includes [^{**34}] persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 [^{*830}] (9th Cir. 2014) (citations omitted). If a regulation qualifies as longstanding and presumptively lawful at step one, we need go no further. *Jackson*, 746 F.3d at 960 (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 792, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011)).

As to the step one analysis, *Heller* specifically identified a non-exhaustive list of "longstanding prohibitions," which can be considered "presumptively lawful regulatory measures" falling outside the scope of Second Amendment protection. 554 U.S. at 626, 627 n.26. The examples identified include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. Similarly, the right to keep and bear arms is limited to "the sorts of weapons" that are "in common use." *Id.* at 627-28 (citing *United States v.*

Miller, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)).

The category of presumptively lawful regulatory measures at issue here is "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 627. The dictionary definitions of the terms 'conditions' and 'qualifications' largely reflect their common meaning. Webster's [**35] first definition of a condition is "[s]omething established or agreed upon as a requisite to the doing or taking effect of something else; a stipulation or provision." Webster's Second New International Dictionary, 556 (1959).¹

As relevant here, a qualification is "[a] condition precedent that must be complied with for the attainment of a status, the perfection of a right, etc., or for admission to an office" *Id.* at 2031.²

¹The ninth listed definition pertains specifically to legal contexts and defines a condition as "[a] provision in a contract, conveyance, grant, or will, providing that the beginning, vesting, rescission, or a modification, of an estate or interest in property or of a personal obligation shall depend upon an uncertain event, which may or may not exist or happen; also, the event itself." Webster's Second New International Dictionary, 556 (1959).

²For reference, the first two definitions of qualification are reproduced here in their entirety: "1. Act or an instance of qualifying, or a state or process of being qualified. 2. a That which qualifies; any natural endowment, or any acquirement, which fits a person for a place, office, or employment, or to sustain any character; requisite capacity or possession; also, a requisite or essential of a thing. b A condition precedent that must be complied with for the attainment of a status, the perfection of a right, etc., or for admission to an office, employment, dignity,

On its face, California's waiting period law is a condition or qualification on the sale of guns: It imposes a brief delay—to permit compliance with background check requirements and provide a 'cooling off' period—as a prerequisite to acquiring a gun.³

[*831] *Heller* also suggested that presumptively lawful regulations should be longstanding. Here, waiting periods—which first appeared on the books in California in 1923—constitute a sufficiently longstanding condition or qualification on the commercial sale of arms to be considered presumptively lawful. *See* Law

etc.,; as, the *qualification* of citizenship." Webster's Second New International Dictionary, 2031 (1959).

³ Although the constitutionality of waiting periods is an issue of first impression, in the aftermath of *Heller*, both our Circuit and our sister Circuits have concluded that regulatory measures need not be expressly named in *Heller* to be considered presumptively lawful. *See, e.g., Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (holding that there was no Second Amendment right to carry concealed weapons in public); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013) (holding "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee"); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012) (holding that burdening "the ability of 18-to-20-year-olds to purchase handguns . . . is consistent with a longstanding, historical tradition"); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (holding that "the existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns" places the law at issue in the presumptively lawful category).

of June 13, 1923, ch. 339, §§ 2, 10, 1923 Cal. Laws 695, 696.

Prohibitions on felon firearm possession illustrate this point. Circuits that have considered the question agree "that longstanding prohibitions on **[**36]** the possession of firearms by felons are presumptively lawful." *Binderup v. Att'y Gen.*, 836 F.3d 336, 347 (3d Cir. 2016); *see also United States v. Bena*, 664 F.3d 1180, 1182-84 (8th Cir. 2011). The term "longstanding" is not restricted to the time of the founding of the Republic. For example, the "first federal statute disqualifying felons from possessing firearms was not enacted until 1938." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (citing Federal Firearms Act of 1938, ch. 850, § 2(f), 52 Stat. 1250, 1251); *see also United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring) (noting that "the weight of historical evidence suggests felon dis-possession laws are creatures of the twentieth—rather than the eighteenth—century") (citation omitted). Legal limits on firearm ownership by the mentally ill are also "of 20th Century vintage." *Skoien*, 614 F.3d at 641 (citing Gun Control Act of 1968, Pub.L. 90-618, § 102, 82 Stat. 1213, 1220). Extending even further into *Heller's* list of examples, other authorities suggest that during the founding era, there were "no restrictions on the commercial sales of firearms as such," nor were there "bans on guns in schools [or] government buildings." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009).

Thus, "*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 196; *see also Skoien*, 614 F.3d at 641 ("[W]e do take from *Heller* the message that exclusions need not mirror limits that were on the books in [**37] 1791."). We have agreed, noting that "early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).

Indeed, waiting-period statutes have existed in several states since the 1920s. *See, e.g.*, Law of June 13, 1923, ch. 339, §§ 2, 10, 1923 Cal. Laws 695, 696; Law of June 2, 1923, ch. 252, § 7, 1923 Conn. Laws 3707; Law of Mar. 7, 1923, ch. 266 § 10, 1923 N.D. Laws 379. And as the majority aptly points out, there is nothing new in having to wait to procure a firearm. Though delay has not always been associated with government regulation, the ability to immediately exercise Second Amendment rights has no foundation in history. Majority Op. at 23. To find otherwise is to focus too narrowly on the precise conduct that laws of the founding era regulated and to oversimplify the founders' views and the Court's views as expressed in *Heller*. Although the notion of a computerized background check would have been foreign to our founding ancestors, we do have clues about what was considered reasonable at that time. *See, e.g., Bena*, 664 F.3d [*832] at 1183 ("In the 1760s, Blackstone explained that English subjects enjoyed a right to have arms [**38] for their defense, 'suitable to their condi-

tions and degree' and 'under due restrictions.' This right and others, he recounted, were subject to 'necessary restraints,' viewed as 'gentle and moderate,' Proposals from the Founding period reflect a similar understanding of the pre-existing right to bear arms.") (citing 1 William Blackstone, *Commentaries* *139, 140).

Unlike the complete ban on handguns at issue in *Heller*, a ten-day waiting period only delays—for a brief, predictable term—the full exercise of the Second Amendment right to keep and bear arms. Such minor temporal regulation is not without precedent. *See, e.g., Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012) ("By 1785, New York had enacted laws regulating when and where firearms could be used, as well as restricting the storage of gun powder.") (citing Act of Apr. 22, 1785, ch. 81, 1785 Laws of N.Y. 152; Act of Apr. 13, 1784, ch. 28, 1784 Laws of N.Y. 627). Moreover, as it applies to the appellees in this case, the delay does not even necessarily prevent them from exercising their right to keep and bear arms because they challenge the law on the basis that they already own firearms and should therefore be considered pre-cleared for acquiring more.

In addition, the imposition of a **[**39]** reasonable waiting period before the exercise of a constitutional right is not anomalous. *Cf. Skoien*, 614 F.3d at 641. The Supreme Court has permitted waiting periods of varying duration in several other constitutional contexts, including before obtaining a marriage license, and permits for gathering to protest or parade. Eugene Volokh, *Implementing the Right to Keep and*

Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1538-42 (2009).

Of course, what is reasonable in one context may not be reasonable in another. For example, unpredictable political events may create a need for a permit to gather in a public space because "timing is of the essence in politics[:] It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969) (Harlan, J., concurring). In contrast, a known ten-day delay in procuring a firearm is relatively minor. No similar external time line exists in the gun ownership context, and certainly not for those who already own firearms and are thus already exercising their Second Amendment rights.

Thus, just as it was in *Peruta*, the question here is whether the regulation in question is outside **[**40]** the scope of the Second Amendment and thus presumptively lawful. *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016). The answer to that question is yes. In full, California's reasonable waiting period is presumptively lawful as a condition or qualification on the commercial sale of arms, which the record demonstrates is also a longstanding regulatory measure. Therefore, I would resolve the inquiry at the first stage of analysis. If, however, the inquiry proceeded to the second stage, I agree completely with the majority's analysis.

APPENDIX B

41 F. Supp. 3d 927; 2014 U.S. Dist. LEXIS 118284

Silvester v. Harris

United States District Court
for the Eastern District of California

August 22, 2014, Decided; August 25, 2014, Filed

CASE NO. 1:11-CV-2137 AWI SAB

ANTHONY W. ISHII, SENIOR DISTRICT
JUDGE.

[*934] FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case deals with the constitutionality of various firearms related statutes. Plaintiffs challenge the 10-day waiting period imposed by California Penal Code § 26815(a)¹ and § 27540(a),²

¹Penal Code § 26815(a) reads in pertinent part: "A dealer . . . shall not deliver a firearm to a person, as follows: (a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 *****3** days of the submission of any fee required pursuant to Section 28225, whichever is later."

and approximately **[**2]** 18 categories of exemptions to the waiting period found in Penal Code § 26000 et seq. and § 27000 et seq. Plaintiffs contend that the 18 exemptions violate the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs contend that the 10-day waiting periods violate the Second Amendment. Specifically, Plaintiffs contend that the 10-day waiting periods violate the Second Amendment as applied to those who already lawfully possess a firearm as confirmed in the Automated Firearms System ("AFS"), to those who possess a valid Carry Concealed Weapon ("CCW") license, and to those who possess a valid Certificate of Eligibility ("COE"). See Doc. No. 91 at 29:23-30:8. Plaintiffs do not challenge the 10-day waiting period on a facial basis, do not challenge the waiting period laws as applied to first time firearms purchasers, and do not challenge the requirement that firearm purchasers pass a background check. See Doc. Nos. 91 at 17:13-15; 93 at 3:1-3; 98 at 16:10-15; and 105 at 7:6-8, 13:17-20.

In March 2014, the Court conducted a bench trial in this matter. The Court has now taken live testimony, deposition testimony, and numerous exhibits. The parties have completed all briefing and made their final arguments. Given the nature of the challenges made, the Court emphasizes that it is expressing no

² Penal Code § 27540(a) reads: "No firearm shall be delivered: (a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission of any fee required pursuant to Section 28225."

opinion on the constitutionality of the 10-day waiting period in general or as applied to first time California firearms purchasers.

After considering the evidence and the arguments, the Court concludes that Penal Code § 26815(a) [*935] and § 27540(a)'s 10-day waiting periods impermissibly violate the Second Amendment as applied to those persons who already lawfully possess a firearm as confirmed by the AFS, to those who possess a valid CCW license, and to those who possess both a valid COE and a firearm as confirmed by the AFS system, if the [**4] background check on these individuals is completed and approved prior to the expiration of 10 days. Because of the Court's resolution of the Second Amendment issue, the Court need not reach the Fourteenth Amendment challenges.

I. REQUEST FOR JUDICIAL NOTICE

Parties' Positions

Defendant requested that the Court take judicial notice of various exhibits. Defendant argued that each of the exhibits could be judicially noticed as legislative facts because such facts are relevant to the justification for the statutes at issue, the court's legal reasoning, and to the decision making process.

Plaintiffs objected and argued that it was unclear how Defendant intended to use the information in the exhibits. Plaintiffs recognized the distinction between adjudicative facts and legislative facts, but contended that they could not determine the admissibility of the exhibits without further clarification. However, rele-

vancy, hearsay, and contestability issues in general with Defendant's exhibits make judicial notice under Rule 201 improper. Further, as part of supplemental briefing, Plaintiffs stated that once specific portions of exhibits were identified by Defendant in her proposed findings of fact and conclusions of law, Plaintiffs would then **[**5]** make arguments in their June 30, 2014 responsive briefing as to those specific exhibits.

Discussion

At the end of the last day of trial testimony, and upon the parties' agreement, the Court ordered the parties to include and to cite to specific proposed exhibits and portions of proposed exhibits as part of their proposed findings of fact and conclusions of law. See Trial Tr. at 526:9-533:13. The parties were permitted to file responsive briefing and objections to the proposed findings, including evidentiary objections to any evidence that was included in the proposed findings and the subject of Defendant's motion for judicial notice. See id. The Court would then make evidentiary rulings based on the briefing and the proposed findings of fact and conclusions of law. See id. This framework was primarily meant to address the exhibits in Defendant's request for judicial notice. The framework was designed to provide the Court and the parties with a method of determining how and for what purpose an exhibit was being used. Defendant's proposed findings of fact and conclusions of law comply with the Court's order. In fact, Defendant helpfully submitted binders with the exhibits and the specific **[**6]** excerpts that were cited in her proposed find-

ings. Nevertheless, as part of Defendant's June 30, 2014 responsive briefing, Defendant defended and addressed exhibits that were part of the request for judicial notice, but were not included in her proposed findings.

If Defendant did not cite an exhibit or portion of an exhibit in her proposed findings and conclusions, then Defendant did not sufficiently rely upon such evidence. There was an inadequate demonstration of how such evidence was intended to be used and/or how the evidence is relevant. The Court will not comb through the hundreds of pages of proposed exhibits and make rulings if an exhibit is not actually cited and specifically relied upon by a party. [*936] *Cf. Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 792-93 (8th Cir. 2012) (courts need not take judicial notice of irrelevant evidence); *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003) (in summary judgment context court is not required to examine the entire file when specific evidence was not adequately identified); *Charles v. Daley*, 749 F.2d 452, 463 (7th Cir. 1984) (courts need not take judicial notice of irrelevant evidence); *Rodriguez v. Bear Stearns Cos.*, 2009 U.S. Dist. LEXIS 31525, *34 (D. Conn. Apr. 14, 2009) (courts need not take judicial notice of cumulative evidence).

Accordingly, the Court will limit its discussion and consideration to the exhibits and excerpts that were actually cited by Defendant in her proposed findings. [**7] Those exhibits are Defendant's Exhibits CD through CI, DG, DH, DM, DQ, DS, DT, DV, DW, DX, EC, EJ, EK, and GN. All other exhibits that were

included in Defendant's March 24, 2014 request for judicial notice (Doc. No. 78), but that were not cited in Defendant's proposed findings of fact and conclusions of law, will not be considered by the Court.

The Defense exhibits at issue fall into one of four general categories — legislative history, history books, professional journal articles, and a newspaper article. The Court will examine each category of exhibits separately.

1. Legislative Histories

The Ninth Circuit has approved of taking judicial notice of legislative history. *Association des Eleveurs de Canards et D'oies du Quebec v. Harris*, 729 F.3d 937, 945 n.2 (9th Cir. 2013); *Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005); see also *Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D. Cal. 1984). Defendant has limited the portions of legislative history that she wishes the Court to consider. In their June 30 responsive briefing, Plaintiffs did not address these specific portions of legislative history. The Court finds that the identified portions of legislative history are relevant and probative. Therefore, the Court will grant Defendant's motion with respect to the identified excerpts of legislative history.

Therefore, the Court takes judicial notice of the [**8] following portions of Exhibit CD: Cover & p. 701. The Court takes judicial notice of the following portions of Exhibit CE: Cover & p. 657. The Court takes judicial notice of the following portions of Exhibit CF: Cover & pp. 2799, 2800. Exhibit CG: Bates Numbers AG000008, AG000026, AG000052 through

AG000055, and AG000059 through AG000061. The Court takes judicial notice of the following portions of Exhibit CH: Bates Numbers AG000231 through AG000233, AG000297 through AG000298, AG000343 through AG000344. The Court takes judicial notice of the following portions of Exhibit CI: Bates Numbers AG000399 through AG000402, and AG000468.

2. Category 2 — History Books

In their June 30, 2014 responsive briefing, Plaintiffs did not make any evidentiary arguments regarding the specific excerpts from Defendant's history books. Regardless, the Court has conducted an independent evaluation of the excerpts submitted.

Exhibit EC consists of excerpts from a book by Jack Larkin, *The Reshaping of Everyday Life: 1790-1840* (Harper Perennial 1988). The excerpts from this book deal with the nature of life in America from 1790 to 1840. Defendant seeks to admit these excerpts in order to demonstrate that, given [**9] the nature of the way of life between 1790 and 1840, most people [*937] would have been unable to readily obtain firearms. Because the geographic and economic conditions did not lend themselves to a person being able to immediately purchase and possess a firearm, Defendant contends that the citizens of 1790 and 1840 would have no quarrel with a government imposed waiting period before obtaining firearms. See Doc. No. 88 at ¶¶ 29-34, G.

Although it appears that Exhibit EC is the type of historical work that has been consulted in cases such as *McDonald*, *Heller*, and *Peruta*, the information

contained in Exhibit EC is not particularly relevant to this case. Exhibit EC appears to be a generalized historical text that touches on many aspects of the American life as it existed between 1790 and 1840. What Exhibit EC excerpts do not contain is any information regarding firearm waiting period laws that may have existed between 1790 and 1840, or information regarding the understanding of the Second Amendment during this timeframe. It is that type of information, not American life in general or the economic and geographic conditions of the time, that are relevant. "The Constitution structures the National Government, [**10] confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). "[T]he constitutional right to bear arms restricts the actions of only the federal or state governments or their political subdivisions, not private actors." *Florida Retail Fed'n, Inc. v. Attorney Gen. of Fla.*, 576 F.Supp.2d 1281 (N.D. Fla. 2008). That naturally-occurring non-governmental forces may have limited the ability of some individuals in some parts of the country to readily obtain firearms does not show that it was understood around 1791 (the year the Second Amendment was adopted) or 1868 (the year the Fourteenth Amendment was adopted) that the government could impose a waiting period between the time of purchase and the time of possession of a firearm.³

³ If anything, given the absence of any such laws, and accepting Defendant's assertions about American life at the time, it seems more likely that the citizenry of 1791 and 1868 would not have

The Court does not find the excerpts in Exhibit EC to be relevant, and declines to consider them.⁴ See *Hargis*, 674 F.3d at 792-93; *Charles*, 749 F.2d at 463; *Rodriguez*, 2009 U.S. Dist. LEXIS 31525 at *34.

Exhibit EK consists of excerpts from a book by Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* (W.W. Norton 2013). Exhibit EK discusses some of the laws in existence around the founding era. However, there is nothing in Exhibit EK that discusses waiting period laws between 1791 and 1868. The first mention of a waiting period law was a 1923 model law that imposed a 1-day waiting period on the delivery of handguns. According to Winkler, this law was proposed by a private organization, the U.S. Revolver Association. Winkler states that this law was adopted by nine states, including California. However, like Exhibit EC, Exhibit EK does not discuss waiting period laws during 1791 or 1868.⁵

[*938] Because there is no discussion of waiting periods during the relevant time periods, the Court does not find the excerpts from Exhibit EK to be rele-

been accepting of such laws because those laws would have created additional difficulties and barriers to obtaining a firearm.

⁴ Even if the Court considered the excerpts of Exhibit EC, they would not change the Court's findings [**11] or conclusions.

⁵ If anything, the cited excerpts indicate that waiting period laws did not exist around 1791 or 1868, that waiting periods are a relatively recent phenomena, and that most states have not had waiting periods. Exhibit EK does not show that waiting periods were outside the Second Amendment's scope. [**12]

vant, and declines to consider them.⁶ *See Hargis*, 674 F.3d at 792-93; *Charles*, 749 F.2d at 463; *Rodriguez*, 2009 U.S. Dist. LEXIS 31525 at *34.

3. Professional Articles

In their June 30, 2014 responsive briefing, Plaintiffs did not make any evidentiary arguments regarding the specific excerpts from the professional journal articles cited by Defendant. Depending on their use in a case, *see Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002), social science studies can be reviewed by courts as "legislative facts."⁷

See Snell v. Suffolk County, 782 F.2d 1094, 1105-06 (2d Cir. 1986); *Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983); cf. *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2011) (government may establish the "reasonable fit" of legislation through a wide range of sources including empirical evidence). Legis-

⁶ Even if the Court considered the excerpts of Exhibit EK, they would not change the Court's findings or conclusions.

⁷ Legislative facts generally arise when a court is faced with a constitutional challenge to a statute. *See Korematsu*, 584 F.Supp. at 1414; *State v. Erickson*, 574 P.2d 1, 5 (Alaska 1978). Legislative facts are facts that help a tribunal or court to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take; they are facts that are ordinarily general and do not concern the immediate parties. *See United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976); *Erickson*, 574 P.2d at 4-5 & n.14. Legislative facts "have relevance to legal reasoning and **[**13]** the lawmaking process, whether in the formation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Comm. Note to Fed. R. Evid. 201(a).

lative facts can be considered more liberally and are outside the structures of Federal Rule of Evidence 201. See *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992); *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976); see also *Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (holding that trial court erroneously took judicial notice of legislative facts under Rule 201).

The Court finds that the excerpts from Defendant's Exhibits DG (pp. 27-29), DH (pp. 585, 588, 590), DS (pp. 228-231), DT (pp. 59-61, 69-72), DV (pp. 1583-1585), DW (pp. 225, 226, 229, 232, 234-236), and DX (pp. 40, 51-52) are relevant. Given the absence of additional argument from Plaintiffs on these exhibits, the Court will consider these exhibits as legislative facts. However, the Court will not take judicial notice of these exhibits under Rule 201. See *Qualley*, 212 F.3d at 1128.

With respect to Exhibits DM and DQ, these are portions of articles that relate to suicide studies in Australia. Exhibit DM is a 1994 study of 33 survivors of attempted firearm suicides, who were all treated at Westmead Hospital (a teaching hospital of the University of Sydney). Exhibit DQ is a 1999 study of suicide statistics from Tasmania, Australia. The Court does not find these articles to be probative. There are cultural, societal, and geographic differences between Australia and the United States. These types of differences can manifest themselves not only when comparing **[**14]** suicide statistics between the two countries, but also when comparing the suicide rates of the states and territories of Australia with the

states of the United States. The Tasmania study, for example, highlights the fact that Tasmania had one of the highest suicide rates of all of Australia, [*939] yet made up only 2.6% of Australia's total population. In other words, there was something unique that was occurring in Tasmania. Suicide is a complex psychological occurrence. Without further expert guidance, the Court is not inclined to consider two studies that focus on two small portions of a separate country. The Court declines to consider Exhibits DM and DQ.⁸ See Hargis, 674 F.3d at 792-93; Charles, 749 F.2d at 463; Rodriguez, 2009 U.S. Dist. LEXIS 31525 at *34.

With respect to Exhibit EJ, this exhibit is several pages from a book entitled "Reducing Gun Violence in America." Only one page of the excerpts has potential relevance (the other excerpts are the cover and publishing pages). The one page discusses a study that found a reduction in the firearm suicide rate for people over the age of 55, and the reduction may have been due to the [**15] Brady Act waiting period. See Defendant's Ex. EJ. The book page appears to have been written by the study's authors, Messrs. Cook and Ludwig. The Court will consider portions of the underlying study. See Defendant's Ex. DH. Because the Court will consider portions of the underlying study, additional information from the study's authors is relevant. The Court will consider Exhibit EJ, but will not take judicial notice of Exhibit EJ under Rule 201. See Qualley, 212 F.3d at 1128.

⁸ Even if the Court did consider the excerpts from Exhibits DM and DQ, those exhibits would not change the Court's findings of fact or conclusions of law

4. Newspaper Article

Exhibit GN is a 2014 newspaper article from the Washington Post, whose headline reads, "Study: Repealing Missouri's background check law associated with a murder spike." Plaintiffs did not address this exhibit as part their June 30 responsive briefing. Nevertheless, Plaintiffs are not challenging California's background check. Plaintiffs do not argue that they should be exempt from a background check nor do they argue that the background check is unconstitutional, rather they argue that they should not be subject to the full 10-day waiting period between the time of purchase and the time of possession. See Doc. No. 105 at 7:6-8, 13:17-20. The Washington Post article purports to describe the results of a study on an issue that is not before **[**16]** the Court. Thus, the article is not relevant, and the Court will not consider Exhibit GN.⁹ See *Hargis*, 674 F.3d at 792-93; *Charles*, 749 F.2d at 463; *Rodriguez*, 2009 U.S. Dist. LEXIS 31525 at *34.

II. STANDING

Defendant contends that the two entity plaintiffs, California Guns Federation ("CGF") and the Second Amendment Foundation ("SAF") do not have standing to maintain this lawsuit. Defendant argues that there is insufficient evidence that the entities have been personally injured by the Penal Code provisions

⁹ Even if the Court did consider the excerpts from Exhibit GN, the Court would not change its findings of fact or conclusions of law.

at issue, and that there is insufficient evidence that any of the entities' members have been injured. CGF and SAF contend that the evidence is sufficient to show both direct personal injuries to themselves, as well as injuries to their members.

Legal Standard

It is the plaintiff's burden to establish standing to bring a lawsuit in federal court. See *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013). An organization may have representational [*940] standing, where it acts as a representative of its members, or direct standing, where it seeks to redress an injury it has suffered in its own right. See *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). "An organization has direct standing to sue when it shows a drain on its resources from both a diversion of its resources [**17] and frustration of its mission." *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012). The organization's "standing must be established independent of the lawsuit filed by the plaintiff." *Fair Hous.*, 666 F.3d at 1219. "An organization cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Valle Del Sol*, 732 F.3d at 1018. An organization may assert standing on behalf of its member if the "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim as-

serted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Evtl. Servs., Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *Washington Evtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013).

Findings of Fact

SAF has between 30,000 and 40,000 members, supporters, and donors in California. Gottlieb Dep. 18:11-13.¹⁰

One-third to one-half of the total 30,000 to 40,000 California members, supporters, and donors are dues-paying members. See id. at 18:16-19:4.

SAF conducts research on state and federal firearms laws, including California's firearms laws. See id. at 22:3-11. Approximately **[**18]** 20% of SAF's research deals with California's firearms laws. See id. at 22:12-19.

SAF also expends funds in the defense of the civil rights of its members, including the prosecution of this lawsuit. See id. at 35:10-23.

SAF seeks input from its members about which litigation to pursue, and SAF members contacted SAF about challenging the California 10-day waiting period. See id. at 28:1-3, 29:2-11. Over the years, a num-

¹⁰ Alan Gottlieb is the Executive Vice President of SAF. The parties stipulated to use Mr. Gottlieb's deposition testimony in lieu of live testimony. See Doc. No. 75.

ber of SAF members have contacted SAF to complain about the 10-day waiting period. See id. at 30:1-15.

SAF has California members who are subjected to the 10-day waiting period, and has California members who wish to purchase a firearm and also have a CCW, a COE, and/or another firearm. See id. at Depo. Ex. 13, Responses to Interrogatories 5, 8-15.

SAF has publicly commented on the 10-day waiting period, and done research into the California 10-day waiting period laws for a number of years (possibly for more than a decade). See id. at 23:25-24:23.

SAF receives between 50 and 100 calls per year from California members regarding the 10-day waiting period. See id. at 43:4-9.

Aside from this lawsuit, SAF has expended resources researching the 10-day waiting period, and expended **[**19]** staff time and money and resources in connection with other people's calls, letters, e-mails, and discussions about the 10-day waiting period. See 35:17-36:1.

[*941] SAF has never attempted to purchase a firearm in California, nor has it incurred any expenses in acquiring firearms in California. See id. at 33:17-20, 62:19-23.

CGF is a public interest group that was created by gun owners. See id. at 117:7-8.

CGF's purposes are to defend people whom CGF believes to be unjustly charged with violating California firearms laws, and to challenge laws that CGF be-

lieves are unconstitutional under the Second and Fourteenth Amendments. See id. at 117:8-12. CGF will file amicus briefs in various cases, including before the United States Supreme Court, but such briefs tend to be on issues that CGF believes would be useful in California. See id. at 120:2-5. CGF routinely publishes white papers, FAQ's, and WikiQ's that explain California's gun laws, including explaining legislative history. See id. at 120:23-121:4. CGF defends people who have been improperly charged for violation of various California firearms, and also engages in litigation to ensure that California's firearms laws are constitutional. See id. at 117:21-118:3.

CGF has **[**20]** approximately 30,000 members, most of whom are in California. See Trial Tr. 121:11-14. Almost all of CGF's members are subject to the 10-day waiting period. See id. at 121:18-19. "Quite a few" of CGF's members have written about the 10-day waiting period on CGF's blog. See id. at 143:11-19.

CGF brought this lawsuit so that its members who already have firearms in the AFS system, possess a CCW, or possess a COE, would not have to wait 10 days to obtain a firearm. See id. at 121:23-25. Although not an individual plaintiff, Gene Hoffman, the CGF's chairman, currently owns a firearm, plans to obtain a firearm in the future, and has a CCW license. See id. at 113:13-114:1, 136:1-7.

CGF has never attempted to purchase a firearm on its own behalf for self-defense. See id. at 145:19-146:2.

Conclusions of Law

1. Direct Standing

To show an injury that is sufficient for direct standing, an organization must show: (1) frustration of purpose, and (2) diversion of funds. See Valle Del Sol, 732 F.3d at 1018.

a. CGF

CGF has met the first requirement. It is within CGF's purposes to defend and advocate for Second Amendment rights, including bringing lawsuits that challenge laws that may infringe upon the Second Amendment. The 10-day waiting period is a law that CGF believes **[**21]** unconstitutionally infringes upon the rights of those who have at least one gun registered in the AFS system, a CCW license, and/or a COE. CGF brought this lawsuit to remedy this perceived unconstitutional infringement. Therefore, CGF has demonstrated that the 10-day waiting period frustrates its purposes.

CGF has not met the second requirement. The testimony of CGF's chairman establishes that CGF is active in litigation in general, and has expended resources in connection with this lawsuit. However, expenditure of resources in the current lawsuit alone does not meet the requirements for direct standing. See Fair Hous., 666 F.3d at 1219. There is no evidence that deals with CGF researching, expending funds, educating or engaging in advocacy activities, or spending time addressing members' concerns about the 10-day waiting period separate and apart

from this lawsuit. *Cf. Valle Del Sol*, 732 F.3d at 1018; *Fair Hous.*, 666 F.3d at 1219.

Because there is no evidence that the 10-day waiting period laws have caused a diversion of CGF's resources, separate and [*942] apart from this lawsuit, CGF has not met its burden of establishing direct standing. *See id.*

b. SAF

SAF has met the first requirement. SAF is engaged in educational, research, and litigation efforts regarding the Second Amendment. SAF believes [**22] that the 10-day waiting period unconstitutionally infringes upon the Second Amendment rights of its members and of non-members in California, and has brought this lawsuit to remedy that perceived infringement. Therefore, SAF has demonstrated that the 10-day waiting period frustrates its purposes.

SAF has met the second requirement. SAF has been researching the 10-day waiting period for likely more than a decade. SAF yearly receives numerous complaints and questions from its members about the 10-day waiting period. SAF has had to divert time, resources, and money as part of its efforts to research the 10-day waiting period and to educate and address the concerns of its California members. Therefore, SAF has demonstrated a diversion of resources from the 10-day waiting period. *Cf. Valle Del Sol*, 732 F.3d at 1018; *Fair Hous.*, 666 F.3d at 1219.

Because SAF has met both requirements, it has established its direct standing to challenge the 10-day waiting period laws. See id.

2. Representative Standing

An organization has standing to bring suit on behalf of its members if the organization shows: (1) its members would have standing to bring suit; (2) the lawsuit is germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested require **[**23]** participation of a member. See *Friends of the Earth*, 528 U.S. at 181; *Bellon*, 732 F.3d at 1139.

CGF and SAF have met the requirements for representative standing by an organization. Both CGF and SAF have members in California who either already possess a firearm, a COE, or a CCW license, and plan on obtaining a firearm in the future. These California members' Second Amendment right to keep and bear firearms is burdened by the 10-day waiting period, see *infra.*, and those members could have filed suit on their own behalf. The burden imposed by the 10-day waiting period is germane to the purposes of both CGF and SAF. These organizations actively research, publicly address/educate, and litigate on Second Amendment issues. No specific members are necessary to either determine the constitutional validity of the challenged laws or to fashion a remedy. Therefore, CGF and SAF have representative standing to sue on behalf of their members. *Friends of the Earth*, 528 U.S. at 181; *Bellon*, 732 F.3d at 1139.

III. SECOND AMENDMENT CHALLENGE

A. Contentions

Plaintiffs' Contentions

Plaintiffs argue that the 10-day waiting period interferes with the right to keep and bear arms, interferes with property rights, and causes additional expenses that may prevent a person from obtaining a firearm. Plaintiffs argue that there were no waiting period laws in existence in either 1791 **[**24]** or 1868, that waiting period laws are not prevalent today, and are not longstanding and presumptively lawful regulations.

Plaintiffs argue that it is unnecessary to determine whether intermediate or strict scrutiny applies because the waiting period **[*943]** laws will not pass intermediate scrutiny. Under intermediate scrutiny, the 10-day waiting period laws are justified as being necessary to do a background check and to provide a cooling off period. However, Plaintiffs argue that they do not contend that they should be exempt from a background check, rather their challenge deals with timing. As for background checks, 10-days is an arbitrary figure. For 20% of all applicants, the background check is approved and completed in about one hour. For those who already own a firearm and are known to be trustworthy due to the licenses that they hold and a history of responsible gun ownership, there is no justification for imposing the full 10-day waiting period. With respect to cooling off periods, Plaintiffs aver that for those individuals who already possess a firearm, the waiting period will not prevent

impulsive acts of violence because the individual already has a firearm. As to concerns about **[**25]** whether a person may become prohibited from possessing a firearm after the firearm has been delivered, California has implemented two "safety net" systems, APPS and rap back. These programs undercut the need to impose a full 10-day waiting period.

Plaintiffs propose that the Court should order modification of the background check system and waiting period laws as follows: Any person for whom Defendant can determine (a) has a valid and current CCW license, that person should be subject to the same background check as the 18 statutory exceptions to the 10-day waiting period and should not be subject to the 10-day waiting period; (b) has a valid and current COE and for whom the AFS system shows a firearm purchase since 1996, that person is subject to the same background check as the 18 statutory exceptions to the 10-day waiting period and should not be subject to the 10-day waiting period; and (c) has purchased a firearm that is documented in the AFS system since 1996, that person may take delivery of the firearm upon approval of the background check. See Doc. No. 91 at pp. 29-30.

Defendant's Contentions

Defendant argues that the 10-day waiting period does not burden the Second Amendment. None of the organizational **[**26]** plaintiffs have attempted to purchase a firearm, and both Plaintiffs Jeff Silvester and Brandon Combs have possessed a firearm at all relevant times. The increased cost or minor inconven-

ience of having to make return trips to a gun store are *de minimis*.

Defendant also argues that the 10-day waiting period falls under one of the longstanding regulatory measures identified by the Supreme Court. The 10-day waiting period is a condition or qualification on the commercial sale of a firearm. As a longstanding and presumptively lawful regulation, the 10-day waiting period does not burden the Second Amendment.

Defendant also argues that in 1791 and 1868, the nature of production of firearms, where firearms were sold in relation to where people lived, and the relative expense of firearms made obtaining a firearm within 10 days of deciding to purchase one nearly impossible. As a result, the people of 1791 and 1868 would have accepted a 10-day waiting period before obtaining a firearm.

Defendant argues that if the Second Amendment is burdened, the 10-day waiting period's burden is not so severe as to justify strict scrutiny. Under intermediate scrutiny, the 10-day waiting period laws are constitutional. The waiting period laws [**27] serve the important interests of public safety and keeping prohibited persons from obtaining firearms.

[*944] The 10-day waiting period reasonably fits these interests in three ways. First, it provides sufficient time for the Department of Justice to perform a background check. The nature of the databases utilized often require analysts to seek out information and dispositions from other agencies, entities, and

states, which can be extremely time consuming. Further, sometimes prohibiting information is entered into the system after the initial check. Without the 10-day waiting period, there could be an incomplete check and prohibited individuals could obtain firearms. Relying on a CCW license or a COE is not a substitute for the background check because new prohibiting events may have arisen after a person obtains the CCW license or COE. Second, it provides a cooling off period so that individuals will have time to re-think committing impulsive acts of violence. Suicide is often based on transient thoughts. Studies show that waiting periods limit a person's access to firearms, and allows time for the transient suicidal thoughts to pass. Even if a person has a firearm in the AFS system, there **[**28]** is no guarantee that the person still has the firearm. Further, a firearm may be in an inoperable condition, or a person may not have ammunition for the weapon. For those individuals, a cooling off period could be beneficial. Further, some guns are not suitable for some purposes, and a cooling off period for a newly purchased firearm is beneficial. Finally, the waiting period laws provide Department of Justice agents with additional time in which to investigate straw purchases. It is better to intercept a weapon before it is delivered to a purchaser. If the waiting period laws did not exist, law enforcement would have to perform more retrievals of firearms from straw purchasers. Therefore, the 10-day waiting period is a "reasonable fit" and constitutional.

B. Findings of Fact**1. Impact of the 10-day Waiting Period**

Unless a statutory exception applies, every person who wishes to purchase a firearm in California must wait at least 10-days from the date of purchase before taking possession of a firearm. See Cal. Pen. Code §§ 26815(a), 27540(a).

The 10-day waiting period affects a person's ability to defend themselves through the use of a newly purchased firearm. See Trial Tr. at 74:2-75:1. The 10-day waiting period interferes **[**29]** with the exercise of dominion over property with respect to a newly purchased firearm. See Trial Tr. 29:10-13, 74:21-75:1.

Generally, the 10-day waiting period requires a firearm purchaser to make at least two trips to a firearms dealer in order to complete a firearms transaction. The multiple trips required to complete a transaction can cause disruptions in work and personal schedules, extra fuel expense, and wear and tear on a car depending upon where a firearm or a firearms dealer is located in relation to the purchaser. See id. at 26:9-14, 33:16-34:12, 35:13-36:8. This can be a financial burden on a purchaser. See id. at 26:15-18, 84:15-85:3.

The 10-day waiting period may also necessitate additional fees for the transfer of firearms between dealers, so that a person can purchase a firearm from a more distant dealer, but can retrieve the firearm from a closer dealer. See 28:2-29:1.

Schedule conflicts and dealer location may cause a person to miss the window to retrieve a firearm after the 10-day waiting period has expired. See 65:12-66:10.

The additional transfer expenses, the impact on a purchaser's schedule, and/or the location of a firearm may combine with the 10-day waiting period **[**30]** to cause a person **[*945]** to forego purchasing a firearm. See 111:2-6.

Plaintiffs Brandon Combs ("Combs") and Jeff Silvester ("Silvester") each currently possess a firearm and both intend to purchase a firearm in the future. See 20:24-21:9, 49:12-19. Neither Combs nor Silvester is prohibited from owning or possessing a firearm in California. See id. at 21:10-11, 63:4-64:21. Both Combs and Silvester have foregone opportunities to purchase a firearm, or have been unable to complete the purchase of a firearm, due to operation of the 10-day waiting period. See id. at 27:18-28:6, 29:2-9, 35:9-36:8, 74:21-75:1, 79:11-14, 82:6-84:1.

2. Waiting Period Laws

Defendant has identified no laws in existence at or near 1791 or 1868 that imposed a waiting period of any duration between the time of purchase and the time of possession of a firearm.

Defendant has identified no historical materials at or near 1791 or 1868 that address government imposed waiting periods or the perception of government imposed waiting periods in relation to the Second Amendment.

To the Court's knowledge, ten states and the District of Columbia impose a waiting period between the time of purchase and the time of delivery of a firearm. Three states and **[**31]** the District of Columbia have waiting period laws for the purchase of all firearms: California (10 days), District of Columbia (10 days),¹¹ Illinois (3 days for pistols, 1 day for long guns),¹² and Rhode Island (7 days).¹³ Four states have waiting periods for hand guns: Florida (3 days),¹⁴ Hawaii (14 days),¹⁵ Washington (up to 5 days from the time of purchase for the sheriff to complete a background check),¹⁶ and Wisconsin (2 days).¹⁷ Connecticut has a waiting period for long guns that is tied to an authorization to purchase from the Department of Emergency Services and Public Protection.¹⁸ Minnesota and Maryland have a waiting period for the purchase of handguns and assault rifles (7 days).¹⁹

¹¹ D.C. Code § 22-4508.

¹² 720 Ill. Comp. Stat. 5/24-3(A)(g).

¹³ R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-35.2(a).

¹⁴ Fla. Stat. § 790.0655(1)(a).

¹⁵ Haw. Rev. Stat. Ann. § 134-2(e).

¹⁶ Wash. Rev. Code Ann. § 9.41.090(1)(c).

¹⁷ Wis. Stat. Ann. § 175.35(2)(d).

¹⁸ Conn. Gen. Stat. Ann. §§ 29-37a(d), (e).

¹⁹ Md. Code Ann., Pub. Safety §§ 5-101(r), 5-123 to 5-125; Minn. Stat. § 624.7132(Subd. 4).

There is no federal waiting period law. See 18 U.S.C. § 922(s) (Brady Act's 5-day waiting period expired in 1998).

In 1923, the California Legislature created a waiting period for handguns, whereby no handgun, pistol, or other concealable firearm could be delivered to its purchaser on the day of purchase. See Def. Ex. CD (1923 Cal. Stat. ch. 339 §§ 10, 11).

In 1953, the 1923 handgun waiting-period law was codified into the California Penal Code with no substantive changes. See Def. Ex. CE (1953 Cal. Stat. ch. 36 **[**32]** §§ 12071, 12072). One California court has cited legislative hearing testimony from 1964 in which witnesses testified that this 1953 law was "originally enacted to cool people off," but that this law was "not enforced with regard to individual transfers through magazine sales nor at swap meets."²⁰ *People v. Bickston*, 91 Cal.App.3d Supp. 29, 32, **[*946]** 154 Cal. Rptr. 409 & n.4 (1979).

In 1955, the California Legislature extended the handgun waiting period from 1 day to 3 days. See Def. Ex. CF (1955 Cal. Stat. ch. 1521 §§ 12071, 12072). No legislative history has been cited that addresses why the waiting period was extended from 1 to 3 days.

In 1965, the California Legislature extended the handgun waiting period from 3 days to 5 days. See

²⁰The parties have not referred or cited to any hearing testimony from 1964.

Def. Ex. CI at AG000401-402 (1965 Cal. Stat. ch. 1007 §§ 12071, 12072).

The legislative history indicates that the Legislature extended the waiting period from 3 days to 5 days in 1965 because the 3-day waiting period did not provide Cal. DOJ sufficient time to conduct proper background checks on prospective concealable firearms purchasers, before delivery of the firearms to the purchasers. See *Bickston*, 91 Cal.App.3d Supp. at 32; Def. Ex. CI at AG000468 (June 30, 1965 letter from Cal. Assemblymember Beilenson letter to the Governor); Def. **[**33]** Ex. CI at AG000470 (June 24, 1965 letter from Assistant Attorney General Barrett to the Governor). Additionally, a report from the 1975-1976 session of the Senate Judiciary Committee indicates that the "purpose of the 5-day provision is to permit the law enforcement authorities to investigate the purchaser's record, before he actually acquires the firearm, to determine whether he falls within the class of persons prohibited from possessing concealed firearms." Def. Ex. CH at AG000298 (Cal. S. Comm. on the Judiciary, 1975-76 Regular Sess., Rep. on A.B. 1441, at 1-2 (1975)). No legislative history relating to the 1965 law has been cited that relates to a "cooling off" period.

In 1975, the California Legislature extended the handgun waiting period from 5 days to 15 days. See Def. Exh. CH (1975 Cal. Stat. ch. 997 §§ 12071, 12072).

The legislative history indicates that the California Legislature extended the waiting period from 5 days

to 15 days in order to "[g]ive law enforcement authorities sufficient time to investigate the records of purchasers of handguns prior to delivery of the handguns." Def. Ex. CH at AG000297 (Cal. S. Comm. on the Judiciary, 1975-76 Regular Sess., Rep. on A.B. 1441, at 1-2 (1975)). **[**34]** A waiting period of 5 days was thought to be "inadequate for the [California] Bureau [of Firearms] to thoroughly check all records of the purchasers . . ." *Id.* at AG000344 (September 15, 1975 letter from Cal. Assembly member Murphy letter to the Governor). No legislative history relating to the 1975 law has been cited that addresses a "cooling off" period.

In 1991, the California Legislature expanded the waiting period to cover all firearms. See Cal. Pen. Code §§ 12071, 12072 (1991 ed.) & Historical & Statutory Notes for 1990 Legislation.

In 1996, the California Legislature reduced the waiting period from 15 days to 10 days. See Def. Ex. CG (Cal. S.B. 671, 1995-96 Regular Sess., ch. 128 sections 12071(b)(3)(A), 12072(c)(1)); Trial Tr. 169:2-5.

The California Legislature reduced the waiting period from 15 days to 10 days because the California Department of Justice ("Cal. DOJ")'s Bureau of Firearms ("BOF") switched to an electronic database system, which allowed for faster processing of background checks. See Def. Ex. CG at AG000061, AG000212 (Cal. S.B. 671, 1995-96 Regular Sess., S. Third Reading, as amended Jun. 4, 1996); see also Def. Ex. CG at AG000057 ("This bill will assist the Department and gun dealers in expediting the back-

ground check process."). **[**35]** BOF is the agency within Cal. DOJ that conducts background checks on prospective **[*947]** firearm purchasers. See Trial Tr. 167:11-13.

A report from the Senate Committee on Criminal Procedure and a report from the Assembly Committee on Public Safety indicate that the waiting period is used to provide time to complete a background check and to provide a "cooling off" period. See Def. Ex. CG at 2099-0051 and AG000075. However, no legislative history related to the 1996 law has been cited that deals with specific findings or evidence related to the "cooling off" period.

One California court has opined: "[I]t appears that an original intent to provide at least an overnight cooling-off period from 'application for the purchase' was supplemented over the years with additional time to allow the Department of Justice to investigate the prospective purchaser of the weapon." *Bickston*, 91 Cal.App.3d Supp. at 32.

3. The California Background Check

The California background check begins with the completion and submission of a Dealer Record of Sales ("DROS"). See Trial Tr. 170:21-24. The DROS is an application form that a gun dealer electronically submits to Cal. DOJ, which contains information about the prospective purchaser, the firearm, and the **[**36]** dealership. See id. at 171:3-19.

After Cal. DOJ receives a DROS application, BOF begins the background check process on the prospective purchaser. See id. at 171:18-172:3.

The DROS application is sent to Cal. DOJ's Consolidated Firearms Information System ("CFIS"), which is a computerized system. See id. at 292:7-16. CFIS coordinates the electronic portion of the background check process, called the Basic Firearms Eligibility Check ("BFEC"), by sending inquiries to other electronic databases and compiling the responses.²¹ See id. at 292:17-294:1.

The first database queried as part of the BFEC is California's Department of Motor Vehicles ("DMV") database.²² See id. at 294:2-3.

The identification information on the DROS application is verified with DMV for several reasons: to ensure that the background check is run on the correct person, to prevent the occurrence of "straw purchases,"²³ and to prevent people from using fake **[**37]** identification to purchase firearms. See id. at 236:23-237:9.

²¹ Defendant's Exhibit CB is a chart that depicts the databases reviewed during the automated review portion of the background check process.

²² Firearms purchasers are required to have a valid California driver license or identification card issued by DMV. See Trial Tr. 236:15-22.

²³ "Straw purchases" occur when a purchaser obtains a firearm for a separate, undisclosed, prohibited person. See Trial Tr. 343:4-14.

Cal. DOJ sends a DROS applicant's California driver's license or California identification number to the DMV database. See id. at 294:4-9. The DMV database then returns the person's name, date of birth, and license status to Cal. DOJ. See id.

The name and date of birth returned by the DMV database are checked against the name and date of birth on the DROS application to see whether the information matches. See id. at 294:10-18. If the information matches and the driver license status is valid, the system continues to the next check within the BFEC process. See id. at 294:19-21. If the information does not match, a "DMV mismatch" is recorded, the background check process stops, and the DROS application is sent to a DMV mismatch queue for Cal. DOJ analysts, [*948] who are known as Criminal Identification Specialist IIs ("CIS Analysts"), to review. See id. at 200:12-17, 294:22-295:6.

CIS Analysts must verify the information before making a final determination as to whether there is a mismatch. See id. at 238:13-239:2. [**38] A DMV mismatch does not necessarily indicate that the person is prohibited from owning or possessing a firearm. See id. at 237:10-238:12. A DMV mismatch can occur for an innocent reason, such as if a dealer incorrectly enters information on the DROS application, or if the applicant has changed his/her name and is using the new name to purchase the firearm, but has not yet updated that information with the DMV. See id.

Unless a DMV mismatch can be corrected by a CIS Analyst, the DROS application must be rejected. See id. at 172:4-11, 238:17-25.

Once a DROS application successfully passes the DMV database check, the next step in the BFEC process is for the DROS application to be queried against the Automated Firearms System ("AFS") database. See id. at 295:9-12. The AFS database checks to see if the subject firearm has been reported as lost or stolen. See id. at 173:7-14, 295:19-20.

The AFS contains various firearms records, but does not contain records for every gun in circulation in California. See id. at 180:17-19. The bulk of the firearms records in the AFS database are DROS's that were made on a particular date and time. See id. at 180:21-24. DROS records from January 1, 2014 forward **[**39]** are kept for long guns. See id. At 181:24-182:1. Although they may go back earlier, the bulk of the DROS records for handguns are from 1996 forward. See id. at 340:1-11. Registrations of certain weapons classified as "assault weapons" from 1989 to 2001 are contained in the AFS. See id. at 181:2-7. The AFS also contains records of CCW license holders. See id. at 181:8-9. The AFS also contains law enforcement reports of weapons that have been identified as being lost, stolen, evidence, held for safekeeping, or retained for official use. See id. at 181:9-13. Finally, the AFS contains voluntary reports of people who have obtained a firearm by various methods, such as operation of law, an inter-family transfer, or transfers relating to curios and relic collections. See id. at 181:14-21. The AFS database is not an "abso-

lute database," but is a type of "leads database" that reflects Cal. DOJ's belief about whom the last possessor of a firearm was based on the most recent DROS transaction. See id. 253:11-14. Law enforcement personnel can access the AFS in the field in real time, and law enforcement officers view the AFS database as reliable. See id. at 251:19-22, 252:15-21, 443:3-20.

If the **[**40]** AFS search finds that the subject firearm has been reported as lost or stolen, Cal. DOJ notifies the local law enforcement agency that made the report and requests that the agency conduct an investigation to confirm that the firearm involved in the pending DROS transaction is the same firearm that was reported as lost or stolen, and to confirm whether the "lost or stolen" entry in the AFS database is still valid and active. See id. at 174:5-14. The resulting investigations by local law enforcement agencies require them to take an active role to confirm that the firearm on the DROS application is actually the firearm that was reported as lost or stolen. See id. at 175:5-9. How soon an agency begins its investigation depends on the agency's priorities, and the issue is rarely resolved within one day's time. See id. at 175:10-15.

If a gun passes the AFS database check, and if the subject gun is a handgun, then **[*949]** the CFIS conducts a 30-day purchase-restriction check.²⁴ See id. at 296:5-8.

²⁴ Under California law, a person can lawfully purchase only one handgun in a 30-day period. See Cal. Pen. Code § 27535; Trial Tr. at 206:19-21.

CFIS checks within its own database to determine whether the DROS applicant purchased another **[**41]** handgun within the previous 30 days. See id. at 296:9-12. If the DROS applicant purchased another handgun within 30 days, then the background check stops and the DROS application is denied. See id. at 296:13-15.

If the DROS applicant has not purchased a handgun within the previous 30 days, CFIS continues to check whether the applicant has had a previous application denied. See id. at 296:16-23. If so, summary information regarding the previous denial is electronically appended to the background check results for a CIS Analyst to review at a later time. See id. at 296:24-297:3. The background check then continues forward. See id. at 297:3-4.

The next step in the BFEC process for all firearms is for the DROS application to be queried against the Automated Criminal History System ("ACHS"). See id. at 297:14-18. ACHS is a state database that contains criminal history information reported to Cal. DOJ by criminal justice agencies in California. See id. at 176:7-16.

The DROS applicant's name, variations on the DROS applicant's name (e.g. Robert, Bob, Bobby), date of birth, a range of dates around the date of birth, and any other identifying information from the DROS application, are all run **[**42]** through the ACHS database as part of an initial check. See id. at 297:19-22, 298:22-299:8. As part of the initial check, ACHS also will query three other databases: the Wanted Persons System ("WPS") database, the California Restraining

and Protective Order System ("CARPOS") database, and the Mental Health Firearms Prohibition System ("MHFPS") database. See id. at 297:23-298:7.

WPS is a California state database that contains records of warrant information. See id. at 184:10-21. A person with a record in WPS could potentially be prohibited from possessing a firearm. See id. at 184:14-18. Under federal law, any warrant prohibits the wanted person from owning or possessing a firearm, and under state law, persons wanted for a felony offense are prohibited from owning or possessing a firearm. See id. at 184:22-185:6

CARPOS is a California state database that contains information on restraining and protective orders. See id. at 182:16-21, 184:6-9. CARPOS is queried in order to detect domestic violence restraining orders and certain protective orders that would prohibit the DROS applicant from owning or possessing a firearm. See id. at 182:22-25.

MHFPS is a California state database that contains **[**43]** mental health records and records of certain prohibited juveniles. See id. at 185:18-186:2. MHFPS is queried in order to detect prohibitions under California law relating to mental health issues. See 186:3-187:17.

The initial check is to see if there is more detailed information about the DROS applicant contained within any of the ACHS, WPS, CARPOS, and MHFPS databases. See id. at 298:17-21.

If the name variations and possible birth dates run in the initial check match records in ACHS's own database, then ACHS returns "criminal identification information" ("CII") numbers associated with the records. See id. at 300:1-13, 327:19-22. CFIS then conducts a subsequent query of the ACHS database utilizing the unique CII numbers to obtain more detailed criminal [*950] history information about the DROS applicant. See id. at 300:1-13. If any of the variant names and birth dates match information contained in the WPS, CARPOS, or MHFPS, then the CFIS system will do a subsequent check of those databases using the particular name and birthdate that generated a match during the initial search so that more detailed information/records can be obtained. See id. at 298:17-21, 300:14-301:23.

If matches are found [**44] in the ACHS, WPS, CARPOS, or MHFPS databases, the information is appended to the results of the background check. See id. at 301:18-23.

After the ACHS, WPS, CARPOS, or MHFPS queries are complete, the next step in the BFEC process is for the DROS application to be queried against the federal National Instant Criminal Background Check System ("NICS") database. See id. at 302:1-3.

NICS checks are similar to ACHS checks in that NICS does a name variant and birth date range check. See id. at 302:4-11. Also similar to ACHS, NICS will conduct a search of its own database as well as a search of three other federal databases: the Interstate Identification Index ("III") database, the National Crime Information Center ("NCIC") data-

base, and the Immigration and Customs Enforcement ("ICE") database. See id. at 191:6-8, 193:13-14, 194:17-25, 195:1-3, 302:12-17.

The III database contains criminal history records from California and other states that share their criminal history records with the FBI. See id. at 191:6-16. If a person is convicted of a felony in any state, that person is prohibited from owning or possessing a firearm under California law. See id. at 192:1-4.

The NCIC database contains federal [**45] warrants, domestic violence restraining orders, and stolen gun information. See id. at 193:15-19.

The ICE database helps to identify people who are in the United States unlawfully. See id. at 195:1-7.

If there are matches or "hits" in the NICS system, the CFIS system goes into a response process. See id. at 303:3-7. The CFIS system will check if there is an FBI number or a state identification number from another state that was included in the NICS response. See id. at 303:7-8. If there are FBI or state identification numbers, then the CFIS system will send another transaction out specifically to the III database to see if there is additional information. See id. at 303:9-12.

After the NICS check is completed, the BFEC is considered complete. See id. at 303:13-16. All results obtained by CFIS through the BFEC's search of databases are attached to the DROS application, and those DROS applications for which there is a

hit/match are placed into the DROS processing queue for a CIS Analyst to review. See id. at 200:6-11, 303:13-304:3. The processing queue is an electronic queue. See id. at 200:9-10.

CIS Analysts first review records in the DMV mismatch queue to determine whether there is a **[**46]** real mismatch of the applicant's identity in the DMV records, or whether the records can be fixed and a match can be made. See id. at 316:20-317:15. If the CIS Analyst is able to correct the mismatch, the CIS Analyst will then send the DROS application through the BFEC process. See id. If a match cannot be made, the DROS application is rejected. See id. at 317:3-5.

CIS Analysts then verify that each DROS applicant is the same individual matched by the computer to the criminal **[*951]** and other database records. See id. at 201:16-20.

CIS Analysts then look into the record to determine if the information in the record would prohibit the individual from possessing a firearm. See id. at 201:20-22. If there is information in the record that would prohibit possession of the firearm, then the CIS Analyst verifies the prohibiting information. See id. at 201:23-202:6. If the CIS Analyst determines that an individual is prohibited from purchasing or possessing a firearm, the CIS Analyst instructs the dealer not to deliver the firearm to the DROS applicant. See id. at 202:7-10.

The amount of time it takes a CIS Analyst to process a queued DROS application depends upon the size of the records involved and **[**47]** the number of data-

bases for which there have been hits. See id. at 202:11-14. It is "fairly routine" for a CIS Analyst to take longer than a day to process a queued DROS application. See id. at 202:15-20.

CIS Analysts may have to confirm or discover a disposition as part of the process of verifying prohibiting information. For example, if the disposition of a prohibiting arrest was a conviction, the person would not be eligible to own or possess a firearm, but if the conviction was dismissed or reduced, the person may be eligible. See id. at 179:11-25.

In cases in which an arrest record contains no dispositional information, the CIS Analyst must obtain a final disposition on that arrest to determine whether the person is actually prohibited. See id. at 201:23-202:6. Without dispositional information, a CIS Analyst cannot determine whether an individual is eligible to own and possess a firearm because there must be a conviction for there to be a prohibition. See 323:12-21. If there is an open disposition, a CIS Analyst has to obtain the disposition, which could mean telephoning a local law enforcement agency, a district attorney, or a court to try to find out the disposition (for example, **[**48]** a conviction or a dismissal). See id. at 180:5-13, 201:23-202:6, 323:12-324:1. Dispositional records could be lost, missing, or purged. See 177:10-11.

In addition to obtaining and confirming in-state records, CIS Analysts routinely "chase down" out-of-state dispositions. See id. at 192:14-21. The federal III database, which contains criminal history information from other states, often does not contain com-

plete and accurate records on out-of-state criminal convictions. See id. at 192:5-8. Dispositional information is frequently missing in the III records. See id. at 192:9-13. CIS Analysts then have to call or fax courts of other states or federal courts to obtain the disposition information. See id. at 192:22-193:12.

Obtaining the necessary dispositional information from either in-state or out-of-state courts can be a very lengthy process. See 180:11-13.

For cases in which there is a disposition, CIS Analysts review criminal history or other relevant records to confirm that Cal. DOJ is correctly approving or denying a DROS application. See id. at 178:12-20.

Further, mental health facilities get information from the patients, who may not be able to provide accurate personal information, **[**49]** and this may cause the CIS Analysts to contact the mental health facility to ensure that a person is not prohibited. See id. at 455:17-456:5.

CIS Analysts must also review and verify the results of the federal NCIC queries because NCIC results are based on a person's name. See 193:20-194:7. CIS Analysts may also need to contact the relevant agencies to confirm that certain warrants are still active because sometimes the warrants **[*952]** are no longer valid. See id. at 194:4-13.

In addition to obtaining missing dispositional information, CIS Analysts must inquire into the background or details of records to make the correct determination on a prohibition. See id. at 319:1-14. For

example, an analyst may have to determine whether a felony that was reduced to a misdemeanor actually could have been reduced. See id. at 319:15-18; see also 319:23-320:7. To conduct such an investigation, the CIS Analysts must contact the arresting agency for a copy of the arrest report and review that report and determine the relationship between the offender and the victim. See 320:8-17.

Similarly, if a member of the military is arrested out of state for possession of a controlled substance, a CIS Analyst must determine **[**50]** the disposition, determine whether the member was subject to a court-marshal, and find out the type of discharge the individual may have received (i.e., honorable or dishonorable). See id. at 320:23-321:7. To conduct this investigation, the CIS Analyst must obtain specific information from the military. See id. at 321:16-22.

CIS Analysts may also have to decipher people's names because aliases may be used. See id. at 455:4-16.

Not all DROS applications go to the processing queue for an analyst to review. See id. at 303:19-21. If a DROS application has been checked by all of the databases, and there are no hits or matches found in any of the databases, then that DROS application is considered "auto-approved" and is not put into any queue for a CIS Analyst to review. See id. at 198:5-12, 303:22-304:3.

The BCEF currently does not check to see if a DROS applicant has a COE, a CCW license, or a firearm within the AFS system. However, it is possible for the

BCEF to include an automated search to determine whether a DROS applicant has a COE, a CCW license, or a firearm in the AFS system. See id. at 279:11-281:24. Such a check would be "simple." See id. at 279:23.

The BFEC may result in one of **[**51]** six dispositions: approved, denied, delayed, undetermined, approved after delay, and denied after delay.²⁵

See id. at 505:11-17. A DROS application may be delayed for up to 30 days in order for BOF to further investigate whether the applicant is prohibited from possessing a firearm. See id. at 506:11-21. For dispositions that result in a finding of "undetermined," i.e. BOF cannot determine whether a person is prohibited from possessing a firearm, the dealer has the discretion to either refuse or permit the transfer of the firearm. See id. at 232:6-15, 506:24-507:3.

Once BOF approves a DROS application, the DROS applicant has 30 days in which to take possession of the firearm. See 27 C.F.R. § 478.124; see also Cal. Pen. Code § 26835(f); Trial Tr. 459:10-13. Accordingly, BOF considers a completed and approved background check to "be good" for 30 days. See **[**52]** Trial Tr. at 459:10-13.

²⁵ Under new legislation known as AB 500, and which appears to be codified at Penal Code § 28220(f), BOF can delay a disposition for up to 30 days in order to further investigate whether an applicant is prohibited from possessing a firearm. See Cal. Pen. Code § 28220(f); Trial Tr. 506:11-21. Plaintiffs have partially relied upon § 28220(f) in their discussion of straw purchases. Plaintiffs do not challenge the constitutionality of § 28220(f).

4. DROS Processing

Cal. DOJ can receive between 1,500 and 10,000 DROS applications per day, but on [*953] average, it currently receives between 2,000 to 3,000 DROS applications per day. See id. at 172:24-173:1, 456:6-8.

In 2010, Cal. DOJ processed 498,945 DROS applications, and had 5,026 denials. See Def. Ex. AA. Therefore, about 99% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2010.

In 2011, Cal. DOJ processed 601,243 DROS applications, and had 5,805 denials. See id. Therefore, about 99.1% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2011.

In 2012, Cal. DOJ processed 817,738 DROS applications, and had 7,524 denials. See id. Therefore, about 99.1% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2012. Of the denials, most were crime related, but 793 were due to mental health prohibitions and 405 were due to domestic violence restraining orders. See Defendant's Ex. AO.

In 2013, Cal. DOJ processed 960,179 DROS application, and had 7,371 denials. See Defendant's Ex. AP; 489 Trial Tr. 332:4-14, 453:4-7. Therefore, about 99.3% [**53] of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2013. Of the denials, most were crime related, but 810 were due to mental health prohibitions

and 460 were due to domestic violence restraining orders. See Defendant's Ex. AP.²⁶

There is always a backlog of DROS applications in the electronic DROS application queue for background checks, and the current backlog stands at about 20,000 DROS applications. See id. at 314:11-20. There are 24 CIS Analysts, and they typically work well in excess of 40 hours a week to keep up with the influx of DROS applications.²⁷

See id. at 200:18-19, 203:1-8, 313:7-314:13. CIS Analysts are required to work mandatory overtime hours (between 30 and 40 overtime hours per week) in order to address the backlog of queued DROS applications. See id. 313:7-314:3.

If a DROS application has been in the DROS application queue for an extended period of time before a CIS Analyst can review it, e.g. day 8 or 9 of the 10-day waiting period, then the CIS Analyst will re-run that DROS application through a "refresher" check of the CFIS state data bases in order to ensure that all updated information is in the CIS Analyst's possession. See id. at 322:3-23, 475:1-14. There have been instances in which additional prohibitors have arisen

²⁶ From 1991 to the present, there has consistently been a DROS application approval rate near 99%. See Defendant's Ex. AA.

²⁷ Cal. DOJ does not hire temporary employees as CIS Analysts because the California budget process does not allow the BOF to start hiring new people, and it typically takes six to eight months to train a CIS Analyst. See Trial Tr. 204:21-205:14, 326:17-327:11. **[**54]**

between the time the DROS application is submitted and the time in which the CIS Analyst reviews the application. See id. at 322:18-21. However, no evidence was presented that quantifies how many times new prohibitors have arisen between the initial check and the refresher check.

Approximately 80% of all DROS applications are not auto-approved and require the review of a CIS Analyst. See id. at 200:2-5.

Approximately 20% of all DROS applications are auto-approved and do not go into the DROS application queue for review by a CIS Analyst. See id. at 198:13-15, 303:22-304:3.

[*954] Depending on network traffic or database maintenance issues, a DROS application can be auto-approved somewhere between 1 minute and 120 minutes, but "probably" **[**55]** auto approvals occur within 60 minutes.²⁸ See id. at 240:1-6, 307:22-309:15.

The only time that a CIS Analyst would review an auto-approved DROS application is if BOF is contacted about a particular DROS applicant by an outside source, such as a law enforcement officer or a medical professional. See 199:8-200:1. Outside requests to further investigate an auto-approved DROS application occur "occasionally." See id. at 199:14-16. No evidence was presented to quantify or explain what is

²⁸The 1 minute figure is based on test programs that were run by BOF. See Trial Tr. 308:8-17.

meant by "occasionally." No evidence was presented concerning at what point in the 10-day waiting period the outside requests are received. No evidence was presented as to how many of the outside requests ultimately led to a denial of the auto-approved DROS applications.

There is no evidence of the average amount of time it takes to complete a "non-auto approved" DROS application. However, because of the daily applications received and the backlog, sometimes a CIS Analyst will not begin to review a queued DROS application until day 8 or 9 of the 10 day waiting period. See id. at 322:3-5.

BOF employees believe that 10 **[**56]** days is a sufficient period of time in which to complete a background check. See 473:25-474:5.

If a background check is completed prior to 10 days, the firearm is not released because state law mandates a 10-day waiting period. See id. at 244:5-12.

5. Information Entry In The Cal. DOJ Databases

Cal. DOJ databases may not have the most up-to-date information because reporting agencies may fail to submit information to the Cal. DOJ databases or may delay in submitting information to Cal. DOJ databases. See Trial Tr. 177:2-15, 187:8-188:15, 220:23-221:2, 324:13-16.

ACHS is not always up-to-date with criminal history records for various reasons, including a lag time between actual disposition and entry of the disposition,

and occasionally records are lost, purged, or never reported. See id. at 177:5-15.

Records in the MHFP are often not complete or up-to-date. See id. 187:8-10. Even though mental health facilities are required by law to report prohibiting events immediately, some facilities still submit records only periodically despite the ability to electronically report immediately. See id. at 187:23-188:7. Further, some courts have not been reporting mental health prohibition information **[**57]** as required by law, and when the state courts do report prohibiting events, the reports are done through the mail, which results in a time lag between when the courts mail the reports and when Cal. DOJ receives and processes them.²⁹ See id. at 187:13-188:15.

6. Cooling Off Period

A cooling off period is a period of time that is intended to provide a person with the opportunity to gather their emotions, so that they do not obtain a firearm in a state of anger and make impulsive decisions to commit acts of violence against **[*955]** themselves or others. See Trial Tr. 232:16-233:7, 499:16-24.

²⁹There is currently work being done to automate the ability of the state courts to report prohibiting mental health events to the BOF. See 188:14-15. There is no indication of when those efforts will come to fruition.

No evidence has been submitted regarding current or historical California suicide statistics or "time to crime" statistics.³⁰

One study **[**58]** that examined 30 survivors of fire-arm suicide attempts indicated that suicide can be a relatively impulsive act in that more than half of the 30 survivors reported having suicidal thoughts for less than 24 hours. See Defendant's Ex. DS at 230. Other studies indicate that, of the total number of survivors studied, more than half had considered suicide for less than one hour prior to their attempt. See Defendant's Ex. DG at p.28. Another study indicates that risk periods for suicide are transient. See Defendant's Ex. DT at 61.

In order to limit the access of a suicidal individual to a handgun, one recent study recommends a waiting period combined with a permit requirement. See Defendant's Ex. DG at 29. The study hypothesizes that for "a suicidal person who does not already own a handgun, a delay in the purchase of one allows time for suicidal impulses to pass or diminish." Id. No specific waiting period is advocated by this study.

Studies regarding suicide rates and waiting period laws conducted prior to 2005 are generally considered inconclusive. See Eugene Volokh, *Implementing the Right To Keep And Bear Arms For Self-Defense: An*

³⁰Time to crime statistics are kept by the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives. See Trial Tr. 418:11-23. Time to crime statistics measure the elapsed time from a lawful sale of a firearm to the time of a crime committed with that firearm. See id.

Analytical Framework And A Research Agenda, 56 UCLA L. Rev. 1443, 1538 (citing Robert [**59] A. Hahn, et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 Am. Jrnl. of Preventative Med. 40, 52 (2005)).

One study examined the national homicide and suicide rates between 1985 and 1997 in light of the enactment of the Brady Act. See Defendant's Ex. DH. For victims aged 21 to 55, no statistically significant differences between treatment states and controls states were found, as to either homicide rates or suicide rates. See id. at 588, 590. However, a decrease in suicide rates for individuals over the age of 55 was observed. See id. The decrease was at least partially offset by an increase in non-gun suicides, which makes it less clear that the waiting period reduced overall suicides for those over age 55. See Defendant's Ex. EJ.

One study performed in 1992 found that only 3% of suicides occur within 2 weeks of obtaining a firearm. See Defendant's Ex. DW at 235 (discussing Kellerman, A.L, et al., *Suicide In The Home In Relationship To Gun Ownership*, N. Eng. J. Med. 327:467-472 (1992)).

One study examined suicide rates for the 238,292 individuals who purchased handguns in California in 1991. See Defendant's Ex. DV. From 1991 to 1996, the waiting period in effect in California [**60] for handguns was 15 days. See id. The study concluded that those who purchase a handgun have a substantially increased risk of firearm suicide, beginning with the first week of purchase and lasting for six

years. See id. Of the 238,292 purchasers, 48 committed suicide within two weeks of obtaining the firearm (after having waited 15 days), and 40 purchasers were murdered with firearms within the first month of obtaining a handgun. See id. at 1585.

7. Criminal Investigations Of Straw Purchases

A "straw purchase" is a purchase that a non-prohibited person makes for someone [*956] who is prohibited from owning and possessing a firearm. See Trial Tr. 343:4-14. Straw purchases are prohibited under federal law, and may implicate California law. See 18 U.S.C. §§ 922, 924; *Abramski v. United States*, 134 S.Ct. 2259, 189 L. Ed. 2d 262 (2014); Cal. Pen. Code §§ 27545, 27590.

Some straw purchasers have never purchased a firearm in California, and some straw purchasers previously have purchased firearms in California. See id. at 350:12-16.

Gun dealers have the right to refuse to conduct a sale of a firearm. See id. at 405:1-3. Dealers can also be indicted for conspiring to facilitate straw purchases of firearms, and so have an incentive to report a suspected straw purchase. See id. at 405:18-25.

Cal. DOJ special agents attend gun [**61] shows to ensure that promoters are in compliance with the law and to prevent prohibited persons from obtaining firearms, magazines, or ammunition. See id. at 342:14-25. Special agents also look for potential straw purchases of firearms. See id. at 343:1-16.

The special agents attempt to identify the parties involved in a straw purchase, such as through license plates, business cards on tables, or observing printed forms being filled out. See id. at 346:14-347:10, 400:1-7. As many as four individuals may participate in a straw purchase at a gun show. See 346:14-347:1. Agents spend a good portion of their time attempting to determine whether any person whom they have identified at the gun show is a prohibited person. See id. at 398:9-399:2.

The special agents attempt to complete an investigation within 10 days because the agents want to be able to intercept the firearm before it is delivered to the straw purchaser. See id. at 348:14-25. Because of the nature of the investigation, if the waiting period were 3 days instead of 10, it would be nearly impossible for the special agents to complete an investigation of a gun show straw purchase prior to delivery of the firearm. See id. at 348:14-349:12. **[**62]** The special agents prefer to intercept a firearm before the firearm is transferred from the straw buyer to the prohibited person because it keeps the firearm off of the street and out of trouble. See id. at 349:13-21.

There are other ways in which the special agents become aware of straw purchases besides observations at gun shows. See id. at 351:3-6. The federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE") and the gun dealers themselves may report suspicious activity, as well as special agent inspections of a gun dealer's records. See id. at 351:8-20. Depending on when the information is obtained by the special agent, the 10-day waiting period may aid the

special agents in determining whether a transaction is a straw purchase and may help the agents intercept the firearm. See 353:6-9, 354:21-355:7, 356:10-16. However, sometimes the special agents must go retrieve the firearm from the straw purchaser because the firearm has already been delivered. See id. at 349:22-23, 354:21-355:7, 407:22-408:6, 408:19-24. For straw purchases detected through an inspection of a dealer's records, the firearm in question usually will have left the store by 30 to 60 days. See id. at **[**63]** 407:22-408:15.

There is no evidence concerning how many straw purchase arrests are made/violations determined by the special agents. There is no evidence that describes what percentage of straw purchase investigations are from gun shows or BATFE reports or dealer reports or dealer inspections. However, in approximately 15% of the straw purchase investigations, the **[*957]** weapon was intercepted within the 10-day waiting period. See id. at 408:16-24. Approximately 85% of straw purchase investigations do not conclude within the 10-day waiting period and a retrieval of the firearm may then be necessary. See id.

8. The APPS System

The Armed and Prohibited Persons System ("APPS") is a database that cross-references persons with firearms records in the AFS, typically a DROS record, with those who have a prohibiting conviction or circumstance. See Trial Tr. At 216:21-217:2. The APPS database consults each of the state databases involved in a BFEC, i.e. the AFS, ACHS, WPS, CAR-

POS, and MHFPS databases. See id. at 475:17-476:10. However, the APPS database is prohibited by law from accessing the NICS system. See id. at 475:11-15. APPS became active in 2007. See id. at 337:19-21. APPS is updated on a 24 **[**64]** hour 7 days a week basis. See id. at 497:25-498:7.

The purpose behind APPS is to identify prohibited persons who have firearms and to enable law enforcement to retrieve the firearms before those persons can use the firearms to harm others or themselves. See id. at 217:21-218:3. APPS is a kind of "pointer tool" that identifies people who may be armed and prohibited in a particular law enforcement agency's jurisdiction, but the information in APPS must be updated and verified before any law enforcement action can be taken. See id. at 218:4-219:7, 337:4-10. As part of the verification process, dispositions sometimes must be "chased down" by an analyst. See id. at 219:11-20.

The BFEC and waiting period is designed to stop a prohibited person from obtaining a firearm, whereas the APPS system is designed to retrieve a firearm from someone who has subsequently become prohibited from possessing a firearm. See id. at 420:11-16, 497:10-15.

APPS records-matching software searches for only an exact name and date of birth, whereas the BFEC searches for name variants and date of birth ranges. See id. at 304:16-305:10. That is, the APPS check will only find exact matches to the name entered, but will **[**65]** not find variations of a name. See id. at 304:24-305:18.

There are 21,000 people identified as armed and prohibited in the APPS system, and these individuals purchased firearms prior to becoming prohibited from doing so. See id. at 338:2-8. Not every person who has become prohibited from possessing a firearm is in the APPS system. See id. at 219:7-10, 340:15-18. Most of the APPS candidates are pulled from records concerning handguns that were sold in California from 1996 forward. See id. at 340:3-11.

9. Rap-Back

A "rap-back" is a notification that Cal. DOJ receives whenever someone with fingerprints on file with Cal. DOJ is the subject of a criminal justice agency record, e.g. a notification of a subsequent arrest record. See Trial Tr. 221:21-222:9, 492:7-12. Rap-back is fingerprint based, which means the match is done by fingerprint. See id. at 223:19-20.

A non-fingerprint based event, such as a mental health hold or a restraining order, would not be discovered through rap-back. See id. at 223:13-16, 224:8-9. Cal. DOJ does not receive rap-backs for persons who are arrested or convicted outside of California. See id. at 224:25-225:2.

Rap-back mainly deals with people who are in the criminal **[**66]** history system and who have fingerprints on record. See 493:8-14. In contrast, APPS deals with people who may or may not have fingerprints in the **[*958]** criminal history system, but who nevertheless are found in a non-fingerprint database, such as the MHFP database. See id. at 493:8-12.

10. CCW Licenses

California law provides for either the sheriff of a county or the chief of police of a city to issue a CCW license to a citizen. See Cal. Pen. Code §§ 26150 (sheriff), 26155 (chief of police); Trial Tr. 458:19-20. CCW licenses apply to pistols, revolvers, or firearms that are capable of being concealed upon a person. See Cal. Pen. Code §§ 26150, 26155. A CCW license allows an individual to carry a concealed firearm in public. See id.

CCW licenses, amendments to CCW licenses, and applications for a CCW license are required to be uniform throughout California. See Cal. Pen. Code § 26175; *Scocca v. Smith*, 912 F.Supp.2d 875, 883 (C.D. Cal. 2012).

In order to obtain a CCW license, an applicant must prove to the sheriff or chief of police that: (1) the applicant is of good moral character; (2) good cause exists for issuance of the license; (3) the applicant either is a resident of the city or county, or has a place of business/employment within the city or county and spends a substantial period of time at the place of business/employment; **[**67]** and (4) the applicant has completed the training course required by Penal Code § 26165.³¹ See Cal. Pen. Code §§ 26150, 26155.

³¹The Court notes that in order to purchase a handgun in California, unless an exemption applies, an individual must obtain a handgun safety certificate. See Cal. Pen. Code § 31615. In order to obtain a handgun safety certificate, an individual must pay a fee and pass a written test. See Cal. Pen. Code §§ 31630, 31640, 31645, 31650, 31655.

CCW license applicants must submit fingerprints along with the CCW license application, and those fingerprints are submitted to Cal. DOJ. See Cal. Pen. Code § 26185(a)(1); *Scocca*, 912 F.Supp.2d at 883. Additionally, if there is "compelling evidence," an applicant may be required to submit to psychological testing before being issued a CCW license. See Cal. Pen. Code § 26190(f).

Once Cal. DOJ receives the fingerprints, Cal. DOJ sends a report to the licensing agency relating to the CCW license applicant, including whether the person is prohibited under state or federal law from possessing, receiving, owning, or purchasing a firearm. See Cal. Pen. Code § 26185(a)(2).

The sheriff or chief of police may not issue a CCW license until he or she receives the Cal. DOJ report on the CCW applicant. See Cal. Pen. Code § 26185(a)(3). No CCW license may be issued if the Cal. DOJ "determines that the person is prohibited by state or federal law from possessing, receiving, owning, **[**68]** or purchasing a firearm." Cal. Pen. Code § 26195(a); *Scocca*, 912 F.Supp.2d at 883.

Once a CCW license is issued, it is valid for up to two years. See Cal. Pen. Code § 26220(a).

The sheriff or police chief may include reasonable restrictions or conditions that they deem warranted, including restrictions as to the time, place, manner, and circumstances under which the CCW license holder may carry a concealed handgun. See Cal. Pen. Code § 26200(a). With some exceptions, the general

rule is that a CCW license has applicability throughout the state of California. See *Scocca*, 912 F.Supp.2d at 883-84.

A CCW license may be revoked whenever Cal. DOJ or the issuing local agency determines that the CCW license holder has become prohibited under state or federal law from possessing, owning, receiving or purchasing a firearm. See Cal. Pen. Code § 26195(b)(1). **[*959]** If Cal. DOJ determines that a CCW license holder has become prohibited, then Cal. DOJ is required to contact the local agency that issued the CCW license. See Cal. Pen. Code § 26195(b)(2). If the local agency revokes a CCW license, that local agency must notify Cal. DOJ. See Cal. Pen. Code § 26195(b)(3).

BOF does not issue CCW licenses, but does accept the applicant's fingerprints and runs a background check on the applicant in order to insure that the applicant is not prohibited from possessing a firearm. See Trial Tr. 458:17-459:6. The BOF forwards the results **[**69]** of the background check, along with a copy of the applicant's California criminal history, to the sheriff or chief of police. See id. at 459:4-6.

BOF considers an approved background check to "be good" for 30 days. See 459:7-13.

Sheriffs or chiefs of police rarely issue a CCW license within 30 days of the completed background check, and some agencies may wait as long as 9 months after the background check before issuing the CCW license. See id. at 459:14-23.

CCW license holders are subject to the "rap-back" system. See id. at 225:15-17. CCW license holders have a CII number. See id. at 488:14-489:22.

Silvester possess a CCW license issued by the City of Hanford chief of police. See Joint Ex. 6.³²

11. Certificate Of Eligibility

A COE is a certificate issued by the California Department of Justice. See Cal. Pen. Code § 26710; Trial Tr. 60:14-17, 494:14-15.

In order to obtain a COE, a person must make a request for a COE to Cal. DOJ. See Cal. Pen. Code § 26710(a). The COE applicant is required to pay a fee. See id. § 26710(d). A COE applicant also provides a full set of live scan fingerprints and is issued a CII [**70] number. See Trial Tr. at 495:9-13. Cal. DOJ is then required to examine its records and the records in NICS "in order to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm." Cal. Pen. Code § 26710(b). If a person passes the background check, pays the filing fees, and submits the fingerprints, then Cal. DOJ is required to issue the COE. See Cal. Pen. Code § 26710(c); Trial Tr. at 511:9-12.

A COE is valid for one year. See Trial Tr. at 61:7-8. COE's may be renewed on a yearly basis by paying a

³²The issuing agency is identified as the city of Hanford. Under Penal Code § 26155, Silvester's CCW license would have been approved by the Hanford chief of police.

fee. See id. at 60:23-25. Prior to the expiration of the COE, the holder submits a renewal form, attests to the accuracy of the date in the renewal form, and pays a fee. See id. at 61:9-22.

A COE is one component/requirement for several exceptions to the 10-day waiting period and for other firearms related activities. For example, "consultant evaluators," who are exempt from the 10-day waiting period, are required to have a COE. See Cal. Pen. Code §§ 16410, 27750. Along with a federal license, a COE is required for certain transfers of curio and relic firearms, and for the curio and firearm exception to the 10-day waiting period. See Cal. Pen. Code §§ 26585, 26970, 27670, 27966. Retail firearms dealers are required to possess inter alia **[**71]** a COE. See Cal. Pen. Code §§ 26700, 26705. A COE may also be obtained for employees of firearm dealers. See Cal. Pen. Code §§ 26915, 29120. In order to organize a gun show, an organizer or producer must **[*960]** have a COE. See Cal. Pen. Code §§ 16800, 27200. A COE is required for some transfers of used firearms at gun shows. See Cal. Pen. Code § 26525. A manufacturer of firearms is required inter alia to possess a COE. See Cal. Pen. Code § 29050. Additionally, some individuals in the entertainment industry or individuals working with the military may seek to obtain a COE. See Trial Tr. 494:25-495:8.

A COE reads: "This is to certify that [Cal. DOJ] has completed a firearms eligibility check on the above named individual. As of the date of issue, there is nothing that would prohibit the individual from acquiring or possessing a firearm." Plaintiff's Ex. 4.

COE's also identify their "date of issuance" and their "date of expiration." See id.

COE holders are subject to the "rap-back" system. See id. at 224:21-24.

Combs possess a valid COE. See Joint Ex. 5.

C. Legal Standard

The Second Amendment reads: "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. The Second Amendment right to keep and bear arms is an individual right and a fundamental right that is incorporated against states and municipalities under the Fourteenth Amendment. See *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 3042, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *Peruta v. County of San Diego*, 742 F.3d 1144, 1149-50 (9th Cir. 2014); *Nordyke v. King*, 681 F.3d 1041, 1043 (9th Cir. 2012) (en banc). The Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 130 S.Ct. at 3044; see *Heller*, 554 U.S. at 630. However, the Second Amendment's protection is not unlimited, and longstanding regulatory measures such as "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms [**72] in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,"

are presumptively lawful. *McDonald*, 130 S.Ct. at 3047; *Heller*, 554 U.S. at 626-27; *United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2013).

The Ninth Circuit has adopted a two-step Second Amendment framework: (1) the court asks whether the challenged law burdens conduct protected by the Second Amendment, and (2) if so, the court determines whether the law meets the appropriate level of scrutiny. See *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *Chovan*, 735 F.3d at 1136; see also *National Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 700 F.3d 185, 194-95 (5th Cir. 2012) ("N.R.A."); *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

Under the first step, courts must determine "whether the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the Second Amendment right, or whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected." *Jackson*, 746 F.3d at 960 (citing *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733-34, 180 L. Ed. 2d 708 (2011)); *Heller*, 554 U.S. at 625; *Chovan*, 735 F.3d at 1136). [*961] This is accomplished by asking "whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the his-

torical scope of the Second Amendment." *Jackson*, 746 F.3d at 960 (citing *Heller*, 554 U.S. at 627; *Chovan*, 735 F.3d at 1137); see also *Peruta*, 742 F.3d at 1153-54; *Ezell*, 651 F.3d at 702-03; *Chester*, 628 F.3d at 680. In assessing the historical understanding, not all historical or scholarly sources are equal, and **[**73]** courts should focus on scholarly opinions that are consistent with *Heller* and *McDonald*, and on historical sources around the adoption of the Second Amendment (1791) and the time near the adoption of the Fourteenth Amendment (1868). See *Peruta*, 742 F.3d at 1155-66; *Ezell*, 651 F.3d at 702-03; *Chester*, 628 F.3d at 680. If a law burdens conduct that falls outside of the Second Amendment's scope, then the analysis ends and there is no violation. See *N.R.A.*, 700 F.3d at 195; *Ezell*, 651 F.3d at 703.

As to the second step, rational basis review is not to be used. *Heller*, 554 U.S. at 628 n.27; *Chovan*, 735 F.3d at 1137. Instead, if a law burdens a right within the scope of the Second Amendment, either intermediate or strict scrutiny will be applied. See *Jackson*, 746 F.3d at 961; *Chovan*, 735 F.3d at 1138; *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 682. Whether intermediate or strict scrutiny applies depends on: (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right. *Jackson*, 746 F.3d at 960-61; *Chovan*, 735 F.3d at 1138; *N.R.A.*, 700 F.3d at 195; *Ezell*, 651 F.3d at 703. Generally, a regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny. See *Jackson*, 746

F.3d at 961; *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 682.

The "intermediate scrutiny" standard requires: (1) that the government's stated objective must be significant, substantial, or important, and (2) that there is a reasonable fit between the challenged regulation and the government's asserted objective. *Jackson*, 746 F.3d at 960; *Chovan*, 735 F.3d at 1139; *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 683. For there to be a "reasonable fit," the regulation [**74] must not be substantially broader than necessary to achieve the government's interest. See *Peruta*, 742 F.3d at 1177; *Reed v. Town of Gilbert*, 707 F.3d 1057, 1074 n.16 (9th Cir. 2013); *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007); see also *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010). The government cannot rely on "mere speculation or conjecture." See *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993); see also *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2011) (government may not rely on "anecdote and supposition"). A regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose," rather there must be an indication that the regulation will alleviate the asserted harms to a "material degree." *Edenfield*, 507 U.S. at 770-71; *Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997).

D. Conclusions Of Law

1. Burden On The Second Amendment

When the 10-day waiting period laws apply, they prohibit every person who purchases a firearm from taking possession [*962] of that firearm for a minimum of 10 days. One cannot exercise the right to keep and bear arms without actually possessing a firearm. Cf. Andrews v. State, 50 Tenn. 165, 178 (1871) ("The right to keep and bear arms necessarily involves the right to purchase them . . ."). The purchased firearm cannot be used by the purchaser for any purpose for at least 10 days. Also, in some cases, due to additional costs and disruptions to schedules, the 10-day waiting period may cause individuals to forego the opportunity to purchase a firearm, and thereby forego the exercise of their Second Amendment right to keep and bear arms. Therefore, [**75] the 10-day waiting period burdens the Second Amendment right to keep and bear arms.³³ Cf. id.

³³ Defendant has argued that because Combs and Silvester have each had a firearm during the relevant time period, their Second Amendment rights have not been impaired. However, that Combs and Silvester have been able to exercise their Second Amendment right with respect to at least one firearm does not mean that they have diminished rights under the Second Amendment. The Second Amendment applies to "arms" and its language does not limit its full protections to a single firearm. Some firearms are better suited for particular lawful purposes than others. Defendant has cited no authority that suggests that the Second Amendment only has application to a single firearm.

It is Defendant's burden to show that the 10-day waiting period either falls outside the scope of Second Amendment protections as historically understood or fits within one of several categories of longstanding regulations that are presumptively lawful. See *Jackson*, 746 F.3d at 960; *Chovan*, 735 F.3d at 1136-37; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell*, 651 F.3d at 702-03; *Chester*, 628 F.3d at 680. Defendant has not met her burden.

First, in terms of relevant historical understandings, Defendant has not established that waiting period laws were understood to be outside the protections of the Second Amendment. Defendant has cited no statutes or regulations around 1791 or 1868 that imposed waiting [**76] periods between the time of purchase and the time of delivery. Nor has Defendant cited historical materials or books that discuss waiting periods or attitudes towards waiting periods between 1791 and 1868. There is no evidence to suggest that waiting periods imposed by the government would have been accepted and understood to be permissible under the Second Amendment. Cf. *Peruta*, 742 F.3d at 1153-66.

Second, in terms of *Heller's* longstanding presumptively lawful regulations, Defendant has not established that the 10-day waiting period is a presumptively lawful longstanding regulatory measure that imposes a condition and qualification on the commercial sale of a firearm. Such commercial regulations have been recognized as presumptively lawful by the Supreme Court. *McDonald*, 130 S.Ct. at 3047; *Heller*, 554 U.S. at 626-27. The Supreme Court did not ex-

plain what precisely it meant by the phrase "conditions and qualifications on the commercial sale of arms," and the parties have cited no cases that interpret this phrase. Through a parenthetical citation in *Nordyke*, the Ninth Circuit suggested that a county ordinance, which permitted firearms to be brought to gun shows on county property if the gun was secured or in one's personal possession, was a law imposing a condition and qualification [**77] on the commercial sale of a firearm. See *Nordyke*, 681 F.3d at 1044. *Nordyke* did not expand on the concept beyond parenthetically quoting the relevant language from *Heller*. *Nordyke* may be read as indicating that the manner of how a firearm is [*963] displayed for sale is an acceptable commercial regulation.

Aside from *Nordyke*, and based on a plain reading of the term, longstanding commercial regulations might entail regulations about who may sell (e.g. a licensed dealer) or purchase (e.g. someone over the age of 18) a firearm, what firearms may be sold (e.g. prohibiting the sale of certain types of firearms), when a firearm may be purchased (e.g. no purchases after 8:00 p.m.), or where a firearm store may be located (e.g. zoning ordinances). In comparison to *Nordyke* and a plain reading of *Heller's* language, it is not clear to the Court that a 10-day waiting period would qualify as a commercial regulation. Defendant cites no comparable commercial laws that apply to other goods and that require an individual to wait around 10-days before completing a purchase. The Court is not satisfied that Defendant has shown that the 10-day waiting period is one of *Heller's* envisioned conditions and qualifications of a commercial [**78] sale.

Moreover, Defendant has not established that the waiting period law is sufficiently "longstanding" to be entitled to a presumption of lawfulness. Included in the concept of a "longstanding and presumptively lawful regulation" is that the regulation has long been accepted and is rooted in history. See *N.R.A.*, 700 F.3d at 196; *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2008). It is true that California has had some form of a waiting period since 1923. However, as described above, the Court is aware of no waiting period laws in any states during the time periods around 1791 and 1868. Consistent with these historical periods, currently only ten states impose a waiting period between the time of purchase and the time of delivery of a firearm. Waiting period laws did not exist near the time of adoption of the Second and Fourteenth Amendments, and they are not common now. That one state may have had some form of regulation for a significant period of time is insufficient for the Court to conclude that the law has been so generally accepted that it is presumptively lawful. Cf. *N.R.A.*, 700 F.3d at 196 (" . . . a longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee."). Further, the 10-day waiting period at issue [**79] was not imposed until 1996, and it was not until 1975 that California began to impose a waiting period that extended to double digits (15 days). Prior to 1975, the waiting period was 5 days. The waiting period that was in effect the longest in California was the 1-day waiting period between 1923 and 1955 for handguns, and there is an indication that the law was not applied to all transactions. Imposition of waiting peri-

ods beyond a "single digit" period is a recent development. *Cf. Church of the Am. KKK v. City of Gary*, 334 F.3d 676, 682-83 (7th Cir. 2003) (noting that 30-day advance notice requirement to obtain a permit was reasonable under the circumstances of one case, but that a 45-day advance notice requirement was a substantially longer period and not reasonable). Finally, the waiting period at issue applies to all firearms. Prior to 1991, the waiting period applied only to handguns. Although the 1996 waiting period is shorter in duration than the 15-day period imposed in 1975, the 1996/1991 waiting period is wider in scope. Applying a waiting period to all firearms is a recent development. In essence, Defendant has simply pointed to the fact that California has had some form of waiting period since 1923. That is not enough.

The 10-day waiting period **[**80]** burdens the Second Amendment rights of the Plaintiffs.

[*964] 2. Level Of Scrutiny

Defendants contend that intermediate scrutiny applies to this case. Plaintiffs contend that the Court may utilize intermediate scrutiny because, if the laws do not pass intermediate scrutiny, then they will not pass strict scrutiny. Plaintiff is correct that if the waiting period laws do not pass intermediate scrutiny, they will not pass strict scrutiny. Given the parties' focus on intermediate scrutiny, and the necessary implication if the laws do not pass intermediate scrutiny, the Court need not decide whether strict scrutiny applies. Instead, the Court will examine the waiting period laws under intermediate scrutiny.

3. Governmental Interest

Defendant contends that California has important interests in public safety/preventing gun violence and preventing prohibited individuals from obtaining firearms. Plaintiffs do not dispute that these are important interests. Courts have recognized a state's important public safety interest with respect to various firearms laws. See Jackson, 746 F.3d at 965. "It is self-evident that public safety is an important government interest." Id. It is also self-evident that preventing people who are prohibited from possessing **[**81]** a firearm from obtaining one is also an important interest that goes hand in hand with public safety. Defendant has demonstrated that public safety and keeping firearms out of the hands of prohibited individuals are important interests. See id.; see also Chovan, 735 F.3d at 1139.

4. Reasonable Fit

Defendant has identified three rationales that it contends are "reasonable fits" that justify the 10-day waiting period: (1) conducting a background check; (2) providing a "cooling off period" to prevent impulsive acts of violence; and (3) investigating straw purchases. The Court will assess each of these justifications in relation to the three "as applied" groups.

a. Those Who Have A Firearm In The AFS System

The class of individuals that Plaintiffs identify within this group are those who already possess a firearm as confirmed by the AFS database, i.e. a firearm transaction is within the AFS system. See Doc. Nos. 91 at

30:5-8; and 105 at 7:15-18. Plaintiffs do not argue that this class of individuals should be exempt from further background checks. Rather, Plaintiffs contend that these individuals should not be subject to a per se 10-day waiting period, and should be able to take possession of their firearm upon passing **[**82]** the background check. See Doc. Nos. 98 at 16:10-15; and 105 at 7:6-8, 13:17-20, 30:25-31:12, 31:21-22. Thus, under Plaintiffs' arguments and challenges, this class of individuals will still be required to undergo and pass a background check when they attempt to purchase a firearm. See Doc. Nos. 91 at 30:5-8; and 105 at 7:6-9, 13:17-20, 30:25-31:22.

i. Background Check

Given the current BOF staffing levels, the potential additional research involved in reviewing a DROS application, and the possible response times from other agencies and states, 10-days is a sufficient period of time in the clear majority of cases for BOF to complete a background check and approve or deny a DROS application.

However, within the 10-day waiting period, background checks can be completed anywhere from 1 minute to 10 days.

20% of all DROS applications are auto-approved usually in about 1 to 2 hours, and **[*965]** require no further review.³⁴

³⁴No evidence indicates that a material number of auto-approved DROS applications are ever rechecked.

The mandated 10-day waiting period is the only thing that stops BOF from approving the sale and releasing the firearm when a DROS application is auto-approved.

80% of all DROS applications [**83] are not auto-approved, and further review, analysis, and/or investigation is necessary to determine if a person is prohibited from possessing a firearm. For non-auto-approved DROS applications that are completed within 10-days, the 10-day mandatory waiting period is the only thing stopping BOF from approving the sale and releasing the firearm.

For all DROS applications that are approved by BOF prior to expiration of the 10-day waiting period, conducting a background check is no longer a justification for the 10-day waiting period because the DROS applicant has been approved as determined by a completed background check.

Although additional disqualifying information may come to BOF's attention during the 10-day waiting period, that can be said of any time-frame, be it 1 day or 60 days. Moreover, the requirement in essence is to pass the background check, it is not to pass the background check every day for 10 straight days. Further, 20% of all DROS applications are auto-approved in a very short period of time, and they normally are not reviewed or rechecked at any time. Finally, of the approximately 99% of DROS applications that are approved, no new disqualifying information was obtained [**84] during the 10-day waiting period. Of the approximately 1% of DROS appli-

cations that are denied, there is no evidence regarding when in the 10-day waiting period that the disqualifying information was obtained, i.e. was the disqualifying information obtained during the initial BFEC or was it obtained late in the process as part of a re-check. Requiring an approved DROS applicant to wait the full 10-days, when the application is otherwise approved and the applicant already has a firearm in the AFS system, on the chance that new information might come in, is unduly speculative and anecdotal. See *Edenfield*, 507 U.S. at 770-71; *Carter*, 669 F.3d at 418; *Valley Broadcasting*, 107 F.3d at 1334.

If disqualifying information arises about an individual who has already taken possession of a newly purchased firearm, California has in place the APPS system, which is designed to retrieve such firearms from prohibited persons. The APPS system acts as a safety net for individuals who have been previously approved to possess a firearm, but who later become prohibited.

ii. Cooling Off Period

The rationale behind the "cooling off period" is to prevent individuals from performing impulsive acts of violence to others or to themselves. The "cooling off period" seeks to limit a person's access to **[**85]** a firearm.

Because 80% of DROS applications are not auto-approved, a waiting period of at least 1-day will naturally occur because CIS Analysts must obtain and review various information.

If a person already possess a firearm, then that person will generally have access to that firearm and may commit impulsive acts of violence with it.

There is no evidence that a "cooling off period," such as that provided by the 10-day waiting period, prevents impulsive acts [*966] of violence by individuals who already possess a firearm.³⁵

A waiting period for a newly purchased firearm will not deter an individual from committing impulsive acts of violence with a separate firearm that is already in his or her possession.

None of the submitted social science studies/excerpts advocate for a 10-day waiting period, or attempt to defend a 10-day waiting period as being supported by clinical or empirical evidence. The studies that are

³⁵ Defendant argues that because some firearms are better suited for certain purposes than other firearms, a waiting period may prevent an impulsive act of violence with the new weapon. Relying on Agent Graham's testimony, Defendant cites the example of Shareef Allman, an individual who had several firearms, including at least one pistol, a rifle, and an assault-style weapon, and who killed nine people in Cupertino, California. See Trial Tr. at 360:13-20, 415:21-416:8. The assault-weapon was not [**86] used in the shooting. See id. at 415:17-21. The pistol was obtained legally, and it was unknown whether the rifle was legally obtained. See id. at 417:9-17, 418:3-10. However, as Agent Graham admitted, any cooling off period created by the 10-day waiting period did not work. See id. at 419:20-23. In Allman's case, Allman did not use the most dangerous firearm (the assault weapon). The firearms that Allman did have were either lawfully obtained and subjected to the 10-day waiting period, or they were obtained unlawfully and not subject to any background checks or waiting periods. Aside from Allman, Agent Graham had no other examples. See id. at 414:7-15.

supportive of waiting periods are supportive in theory and seem to assume that the individual does not already possess a firearm. E.g. Defendant's Ex. DG at 29.

It is true that some individuals may not have ammunition for a firearm in their possession, or that the firearm may not be in working condition. However, no evidence attempts [**87] to quantify this, and it is unduly speculative to conclude that this is a common occurrence. See *Edenfield*, 507 U.S. at 770-71; *Carter*, 669 F.3d at 418; *Valley Broadcasting*, 107 F.3d at 1334.

If an individual already possess a firearm and then passes the background check, this indicates a history of responsible gun ownership. There has been no showing that applying the 10-day waiting period to all individuals who already possess a firearm will materially prevent impulsive acts of violence. See *Valley Broadcasting*, 107 F.3d at 1334.

In terms of the AFS database to confirm possession of a firearm, the BCEF can be modified to make a simple check if a DROS applicant has a firearm within the AFS database.

It is true that the AFS system does not contain every firearm in circulation in California. However, if a person has a weapon that appears within the AFS system database, and that person's application is otherwise approved, Defendant has not explained why it should be presumed that such an individual no longer possesses the firearm. Such a presumption is not supported by any identified evidence. Moreover,

the AFS system is available to law enforcement personnel on a real time basis in the field, and law enforcement considers the AFS system to be reliable. If a law enforcement officer in the field who is about to **[**88]** confront a suspect can use and rely on the AFS system and proceed with more caution, then it is unknown why Cal. DOJ or BOF cannot also assume that an otherwise approved DROS applicant is still in possession of a firearm that is in the AFS system. Considering the absence of relevant data, law enforcement's real time reliance on the AFS system, and an otherwise approved background check, it can reasonably be assumed that a DROS applicant **[*967]** who has a firearm in the AFS system is still in possession of that firearm.³⁶

iii. Straw Purchases

There is no evidence that the legislature implemented the waiting period laws in order **[**89]** to give law enforcement the opportunity to investigate straw purchases.

In a straw purchase, although it might be easier to intercept a weapon prior to delivery, this only occurs

³⁶To the extent that there are unarticulated concerns about whether an individual still possess a firearm within the AFS system, it may be possible to add a question on the DROS application in order for the applicant to confirm that the individual still possess a firearm that was either voluntarily registered, a handgun purchased on or after January 1, 1996, or any firearm purchased on or after January 1, 2014. However, the parties have not addressed the issue, and the Court expresses no opinion on the matter, other than to say that an additional question may be a possibility.

in about 15% of investigations. There is no evidence regarding the number of straw purchase investigations that lead to arrests or convictions or retrievals of firearms relative to the number of DROS applications. Further, although some straw purchasers have purchased other guns in the past, there is no evidence regarding how often this occurs.

Straw purchase investigations begin when law enforcement officers review paperwork at gun shops, observe behavior and interactions at gun shows, or receive a tip from BATFE or a gun shop owner. Not all of the transactions observed or paperwork examined create a reasonable belief that a straw purchase is occurring. The agents only investigate a transaction if they have reason to believe that a straw purchase is occurring. Given Agent Graham's description of straw purchase investigations, the vast majority of transactions do not appear to be straw purchases.

Applying the full 10-day waiting period to all transactions for purposes of investigating a straw purchase, in the [**90] absence of any reason to suspect that a straw purchase is in fact occurring, is too overbroad. See Peruta, 742 F.3d at 1177.

If law enforcement officers personally observe what they believe to be a straw purchase, be it at a gun show or at a gun store, they may intercede during the purchase process.

If the legislature believes that law enforcement should have additional time in which to investigate a straw purchase, then a statute could be enacted that permits law enforcement to cause a delay in the ap-

proval of a DROS application, if law enforcement has reason to believe that a straw purchase is occurring.³⁷

iv. Conclusion

As applied to individuals who already possess a firearm as confirmed by the AFS system, Defendant has not established that applying the full 10-day waiting period when the background **[**91]** check is completed prior to 10-days is a "reasonable fit." The 10-day waiting period laws as applied to individuals who already lawfully possess a firearm as confirmed by the AFS system, and who pass the background check prior to 10-days, violates the Second Amendment.³⁸ **[*968]** See *Edenfield*, 507 U.S. at 770-71; *Peruta*, 742 F.3d at 1177; *Valley Broadcasting*, 107 F.3d at 1334.

³⁷ California has provided for additional delays if there is difficulty in determining whether an individual is prohibited from possessing a firearm. Cal. Pen. Code § 28220(f). Plaintiffs suggest that law enforcement may utilize AB 500/§ 28220(f) in the context of straw purchases. The parties have not briefed this issue extensively, and the Court does not express an opinion on the question, other than to note that such an interpretation of § 28220(f) may be possible.

³⁸ Again, the Court emphasizes that this as applied challenge is not one that challenges the requirement that a purchaser pass a background check. These individuals must still pass the background check when they attempt to purchase a firearm. They may not, however, be required to wait the full 10-days if the background check is completed and approved prior to 10-days.

b. Those Who Have A CCW Licensei. Background Check

Plaintiffs do not contend that CCW license holders should not have to undergo and pass the background check. First, Plaintiffs' proposed injunctive relief requests that CCW license holders undergo the same background check as other individuals who are exempt from the 10-day waiting period. Police officers who are exempt from the 10-day waiting period pursuant to California Penal Code § 26950(a) and § 27650(a) must still pass the BFEC. See Trial Tr. 501:17-19. Therefore, the BFEC/standard background check would apply to CCW license holders when they attempt **[**92]** to purchase a firearm. Second, Plaintiffs have expressly confirmed that all members of the as applied challenges would still be required to pass a background check when they attempt to purchase a firearm. See Doc. No. 105 at 7:6-8, 13:17-20, 30:25-31:22.

The Court's above analysis with respect to background checks for those who have a firearm in the AFS system also applies to CCW license holders. If the background check is completed in less than 10-days, then a background check is no longer a justification to make a CCW license holder wait the full 10-days.

Also, the BFEC can be modified to make a simple check through the AFS system to determine if a person has a valid CCW license.

Additionally, not only does the APPS system act as a safety net for any CCW license holder who may become prohibited from possessing a firearm, the rap back program acts as a further safety net with respect to California criminal conduct by a CCW license holder.

ii. Cooling Off Period

For CCW license holders who already possess a firearm as confirmed by the AFS system, the above analysis regarding a cooling off period (for those who already have a firearm as confirmed in the AFS system) also applies to CCW license [**93] holders.

For CCW license holders who do not already possess a firearm as confirmed by the AFS system, there is no evidence regarding unlawful firearm violence committed by CCW license holders. There is no evidence regarding suicide attempts by CCW license holders or how long after purchase of a firearm that suicides by CCW license holders generally occur. The social science studies regarding waiting periods in general are inconclusive at best. None of the submitted social science studies presented to the Court address suicide as it relates to individuals who must meet the type of requirements of a CCW license,³⁹

³⁹The Court notes that one professional article endorsed waiting periods, prohibiting certain individuals from purchasing firearms, and permits for handgun purchasers. See Defendant's Ex. DG. California has such a prohibition and conducts a background check to enforce those prohibitions. Also, CCW license holders who purchase a handgun will have gone through two certification-type processes: the process to obtain the CCW li-

and none of the excerpts advocate for or defend a 10-day cooling off period.

[*969] The nature [**94] and unique requirements of CCW licenses are such that it is unlikely that CCW license holders would engage in impulsive acts of violence. CCW license applicants must demonstrate good moral character. Engaging in unlawful acts of violence is inconsistent with good moral character. CCW license applicants must take a statutorily mandated class and demonstrate proficiency and safe handling of a firearm. Safe handling practices could cause a gun owner to be more reflective and deliberate about using a firearm. CCW license applicants must pass the BFEC, which searches databases that deal with criminal and mental health prohibitions. If the person does not pass the background check, they cannot obtain a CCW license. CCW license applicants must demonstrate good cause to either a sheriff or a police chief in order to obtain the CCW license, and a sheriff or chief of police may impose reasonable restrictions on as part of a CCW license. Thus, CCW licenses are not issued without reason and individual consideration. If there is sufficient cause to believe that an applicant has or is experiencing mental health problems, then a sheriff or police chief may require that applicant to undergo psychological [**95] testing. If a person is mentally unstable with respect to themselves or others, the psychological testing could detect that problem. With the exception of passing the BFEC/standard background

cense and the process to obtain a handgun safety certificate. See Cal. Pen. Code §§ 26150, 26155, 31615.

check, none of these CCW license requirements must be met by an ordinary California firearms purchaser. Finally, once issued, a CCW license allows its holder to carry a concealed handgun in public for 2 years, generally throughout the entire State of California.

If an individual has met the requirements for obtaining a CCW license, and thereby has demonstrated that he or she can be expected and trusted to carry a concealed handgun in public for 2 years, it is unknown why that person would have to wait 10-days before being permitted to take possession of newly purchased firearm.⁴⁰ Imposing the 10-day waiting period as a cooling off period on a CCW license holder is speculative and its effects appear remote at best.⁴¹ See *Edenfield*, 507 U.S. at 770-71; *Peruta*, 742 F.3d at 1177; *Valley Broadcasting*, 107 F.3d at 1334.

iii. Straw Purchase

The Court's above analysis with respect to straw purchases for those who have a firearm in the AFS system also applies to CCW license holders.

⁴⁰The Court notes that the submitted legislative history regarding the California waiting periods generally support the conclusion that the waiting period laws were modified to 5 days, 15 days, and 10 days in response to concerns about the background check process. There is little **[**96]** evidence to suggest that the waiting periods were modified for the purpose of expanding or retracting a cooling off period.

⁴¹The Court notes that the state of Florida exempts its CCW license holders from the 3-day waiting period for handguns. See Fla. Stat. § 790.0655(2)(a).

There is no data or evidence regarding CCW license holders engaging in straw purchases.

The requirements for obtaining a CCW license strongly indicate that a CCW license holder is unlikely to engage in a straw purchase. A CCW license holder must demonstrate to either a sheriff or a police chief that he or she is of good moral character. Engaging in a straw purchase so that a prohibited person may obtain a firearm is not compatible with good moral character. A CCW license holder must also demonstrate good cause for issuance of a CCW license. If there is good cause [*970] to obtain the CCW license, it seems unlikely that a CCW license holder would jeopardize the CCW license for the purpose of helping a prohibited individual obtain a firearm. *See Edenfield*, 507 U.S. at 770-71; *Valley Broadcasting*, 107 F.3d at 1334.

iv. Conclusion

As applied to individuals who [**97] hold a valid CCW license, Defendant has not established that applying the full 10-day waiting period when the background check is completed prior to 10-days is a "reasonable fit." The 10-day waiting period laws as applied to individuals who possess a valid CCW license, and who pass the background check prior to 10 days, violates the Second Amendment.⁴² *See Edenfield*, 507

⁴² Again, the Court emphasizes that this as applied challenge is not one that challenges the requirement that a purchaser pass a background check. These individuals must still pass the background check when they attempt to purchase a firearm. They

U.S. at 770-71; *Peruta*, 742 F.3d at 1177; *Valley Broadcasting*, 107 F.3d at 1334.

c. Those Who Have A COE

Plaintiffs do not contend that COE holders should not have to undergo and pass a background check. First, Plaintiffs' proposed injunctive relief requests that COE holders undergo the same background check as other individuals who are exempt from the 10-day waiting period. Police officers who are exempt from the 10-day waiting period pursuant to California Penal Code §§ 26950(a) and 27650(a) must still pass the BFEC/standard background check. See Trial Tr. 501:17-19. Therefore, the BFEC/standard background check **[**98]** would apply to COE holders when they attempt to purchase a firearm. Second, Plaintiffs have expressly confirmed that all members of the as applied challenges would still be required to pass a background check when they attempt to purchase a firearm. See Doc. No. 105 at 7:6-8, 13:17-20, 30:25-31:22.

The class of COE holders under this as applied challenge was somewhat unclear. Plaintiffs indicated that the class consisted of those who merely hold a valid COE. See id. at 7:11-13.

However, a COE in and of itself only establishes that a person passed the background check one other time in the past. Unlike a CCW license holder, a COE holder does not have to establish good moral charac-

may not, however, be required to wait 10-days if the background check is completed and approved prior to 10-days.

ter, good cause, take a mandated course, or be subject to possible psychological testing. That is, COE holders are not subject to nearly the same level of scrutiny as are CCW license holders. At oral argument, Plaintiffs acknowledged that the process to obtain a CCW license is more demanding than that required to obtain a COE. See id. at 8:12-21.

If a COE holder does not already possess a firearm, they are very similar to a first time firearms purchaser. Plaintiffs do not challenge the waiting period laws for **[**99]** first time firearms purchasers without a COE. Plaintiffs stated at oral argument that while it is theoretically possible for a COE holder to not possess a firearm, it was highly unlikely. See id. at 8:21-9:1. However, Plaintiffs conceded that "if somebody has a COE, but there is no evidence that they also own a gun, it may be appropriate to subject them to a 10-day waiting period." Id. at 10:8-12.

Given the Plaintiffs' concessions at oral argument and the nature of merely holding a COE, the Court cannot hold that the 10-day waiting period as applied to those **[*971]** who merely hold a valid COE violates the Second Amendment.

However, Plaintiffs stated that any concerns about whether a COE holder already possess a firearm could be addressed through the remedy issued, essentially by fashioning "a remedy that says COE and possess a firearm." Id. at 9:22-10:3. This is consistent with the relief requested by Plaintiffs in their proposed findings of fact and conclusions of law. Plaintiffs requested injunctive relief for those who hold a

valid COE and also have a firearm as confirmed by the AFS system. See Doc. No. 91 at 30:1-4.

Consideration of the waiting period laws as applied to those who possess both a valid COE **[**100]** and a firearm as confirmed by the AFS system leads to a finding that the waiting period laws violate the Second Amendment. For those who have both a valid COE and already possess a firearm as confirmed by the AFS system, the constitutional analysis would be the same as detailed above for those who already possess a firearm as confirmed by the AFS system. The only distinction between the two "as applied groups" is that the COE holder has made himself or herself more identifiable in terms of the state criminal law firearms prohibitions through the rap back program and the issuance of a CII number.

The BFEC can be modified to make a simple check through the AFS system to determine if a DROS applicant has a valid COE and also to determine if the DROS applicant has a firearm within the AFS database.

The Court will accept Plaintiffs' concessions and suggestions. For the reasons stated above with respect to those who have a firearm as confirmed by the AFS system, the Court finds that the 10-day waiting period laws as applied to those who possess both a valid COE and a firearm as confirmed by the AFS system, and who pass the background check prior to 10 days, is not a reasonable fit and thus, violates the Second Amendment **[**101]** . See *Edenfield*, 507 U.S. at 770-

71; *Peruta*, 742 F.3d at 1177; *Valley Broadcasting*, 107 F.3d at 1334.

IV. FOURTEENTH AMENDMENT CHALLENGE

Plaintiffs state that the Court need not address their Fourteenth Amendment challenges if the Court finds merit to their three as applied challenges to the 10-day waiting period. Plaintiffs contend that if a violation of the Second Amendment is found, then the appropriate injunctive relief would essentially create additional exceptions to the waiting period and the Fourteenth Amendment issues would not need to be addressed. Because the Court has found violations of the Second Amendment as discussed above, the Court will follow Plaintiffs' recommendation and decline to reach the Fourteenth Amendment issues.

V. ORDER

The Court has found that the 10-day waiting periods of Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to certain groups. Plaintiffs urge the Court to follow the approach of *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), in which the Seventh Circuit stayed its ruling for 180-days in order to give the Illinois legislature the opportunity to craft new laws in light the unconstitutionality of various Illinois firearms laws. The Court finds *Moore's* approach to be appropriate.

Accordingly, IT IS HEREBY ORDERED that:

1. The 10-day waiting periods of California Penal Code § 26815(a) and [*972] § 27540(a) violate the

Second Amendment as applied to those individuals who successfully pass the BFEC/standard background check prior to 10 days and who are in lawful possession **[**102]** of an additional firearm as confirmed by the AFS system;

a. If the BFEC/standard background check for such an individual is completed and approved before 10-days, Defendant shall immediately release the firearm for delivery to such individual and shall not wait the full 10-days;

2. The 10-day waiting periods of California Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to those individuals who successfully pass the BFEC/standard background check prior to 10 days and who possess a valid CCW license issued pursuant to California Penal Code § 26150 or § 26155;

a. If the BFEC/standard background check for such an individual is completed and approved before 10-days, Defendant shall immediately release the firearm for delivery to such individual and shall not wait the full 10-days;

3. The 10-day waiting periods of California Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to those individuals who successfully pass the BFEC/standard background check prior to 10 days and who possess both a valid COE issued pursuant to California Penal Code § 26710 and a firearm as confirmed by the AFS system.

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a. If the BFEC/standard background check for such an individual is completed and approved before 10-days, Defendant shall immediately release the firearm for delivery to such individual and shall not wait the full 10-days;

4. Defendant **[**103]** shall modify their BFEC procedures as they deem necessary so as to be able to comply fully and in good faith with this order;⁴³

5. Nothing in this order is to be construed as interfering with Defendant's authority to deny a transfer or sale of a firearm to those who are prohibited by state or federal law from possessing a firearm;

6. Nothing in this order is to be construed as interfering with the Defendant's ability to delay a transfer or sale of a firearm when further investigation is required to confirm that a buyer or transferee is not prohibited by state or federal law from possessing a firearm;

7. Paragraphs 1 through 6 of this order are stayed for a period of 180 days from entry of this order;

⁴³The Court particularly directs Defendant's attention to the testimony Assistant Bureau Chief Buford and the "simple" checks within AFS to determine if an individual has a firearm, has a valid CCW license, or has a valid COE.

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8. The parties shall appear for a status conference on December 8, 2014 in Courtroom No. 2 at 1:30 p.m.;⁴⁴
and

9. The Clerk shall enter judgment in favor of Plaintiffs and against Defendant.

IT IS SO ORDERED.

Dated: August 22, 2014

/s/ Anthony W. Ishii
SENIOR DISTRICT JUDGE

⁴⁴The parties shall file a joint status conference report on December 1, 2014. If the parties **[**104]** agree upon a different date for a status conference, they may file a stipulation with the Court to move the status conference.

APPENDIX C

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

FILED

APR 4 2017

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

**JEFF SILVESTER;
BRANDON COMBS;
THE CALGUNS
FOUNDATION, INC.,
a non-profit organiza-
tion; THE SECOND
AMENDMENT
FOUNDATION, INC.,
a non-profit organiza-
tion,**

Plaintiffs - Appellees,

v.

**KAMALA D. HARRIS,
Attorney General of
the State of California,
in her official capacity,
Defendant - Appellant.**

No. 14-16840

D.C. No.

**1:11-cv-02137-AWI-
SKO Eastern District
of California, Fresno**

ORDER

**Before: THOMAS, Chief Judge, and SCHROEDER
and NGUYEN, Circuit Judges.**

(C1)

The panel has voted to deny Plaintiffs-Appellees' petition for panel rehearing. Judges Thomas and Nguyen have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Plaintiffs-Appellees' petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.