

No. 20-55437

**In The United States Court of Appeals
for the Ninth Circuit**

KIM RHODE, ET AL.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,

Defendant-Appellant

On Appeal from the United States District Court
Southern District of California

The Honorable Roger T. Benitez
No.3:18-cv-00802-BEN-JLB

**BRIEF OF EVERYTOWN FOR GUN SAFETY SUPPORT FUND AS
AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety Support Fund has no parent corporations. It has no stock and hence no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Everytown for Gun Safety Support Fund (“Everytown”) is the education, research, and litigation arm of Everytown for Gun Safety, the nation’s largest gun-violence-prevention organization, with nearly six million supporters across the country, including tens of thousands in California. Everytown for Gun Safety was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after 20 children and six adults were murdered by a gunman with an AR-15 rifle in an elementary school in Newtown, Connecticut. The mayors of more than fifty California cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown has drawn on its expertise to file briefs in numerous Second Amendment cases, including challenges to laws similar to the one at issue here, offering historical and doctrinal analysis that might otherwise be overlooked. *See, e.g., Colo. Outfitters Ass’n v. Hickenlooper*, No. 14-1290 (10th Cir.) (firearm background checks); *Silvester v. Harris*, No. 14-16840 (9th Cir.) (firearm waiting periods). Several courts have cited and expressly relied on

Everytown’s amicus briefs in deciding Second Amendment and other gun cases. *See, e.g., Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 112 n.8 (3d Cir. 2018); *Rupp v. Becerra*, 401 F. Supp. 3d 978, 991-92 & n.11 (C.D. Cal. 2019), *appeal docketed*, No. 19-56004 (9th Cir. 2019); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2210-11 & nn.4, 7 (2019) (Alito, J., dissenting).

In the district court below, Everytown moved for leave to file an amicus brief much like the one it now files in this Court, setting forward the historical background supporting California’s law. ER 599-602; *see* Dkt. 36-1. Even though all parties consented to Everytown’s request, ER 600—and even after the Attorney General expressly referred to the historical arguments in Everytown’s brief as “very strong” reasons to deny a preliminary injunction, ER 481—the district court denied leave to file the amicus brief in a one-paragraph order, stating only that the State was “well-equipped to defend the statutes at issue.” ER 234. The district court then failed to address any of the relevant history supporting California’s law, and instead concluded, without analysis, that the challenged law had “no historical pedigree.” ER 54.

Everytown submits this amicus brief to address the district court's erroneous conclusion.¹

INTRODUCTION

Background checks have long been required before the purchase of a gun. And, despite the district court's assertion that "criminals, tyrants, and terrorists don't do background checks," ER 2, the facts tell a very different story: background checks work.

Since the introduction of the federal background check system for firearms twenty-six years ago, background checks have prevented more than 3.5 million illegal gun sales to felons, domestic abusers, and others prohibited by law from possessing firearms.² In California alone, between 1998 and 2018, background checks prevented more than 64,233 gun sales to such prohibited

¹ An addendum of selected, publicly available historical gun laws accompanies this brief. All parties consent to this brief's filing, and no party's counsel authored it in whole or in part. Apart from Everytown, no person contributed money intended to fund the brief's preparation and submission.

² Jennifer C. Karberg et al., *Background Checks for Firearm Transfers, 2015 - Statistical Tables*, Bureau of Justice Statistics (Nov. 30, 2017), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6126>; *Background Checks Save Lives and Protect Our Communities*, Everytown for Gun Safety (Jan. 8, 2019), <https://everytownresearch.org/background-checks-save-lives-protect-communities/>.

(cont'd)

persons.³ In short, as the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) has explained, background checks “can enhance public safety, assist law enforcement, and help ensure firearms end up only in the hands of those who are legally allowed to possess them.”⁴

This is true for ammunition as it for firearms. The same laws that prohibit the possession of firearms by violent felons and other dangerous persons also prohibit the possession of ammunition. 18 U.S.C. § 922(g); Cal. Penal Code § 30305(a). Thus, in 2016, California voters approved Proposition 63 (“Prop. 63”)—the law challenged here—which “require[s] background checks for ammunition sales just like gun sales,” in order to “stop both from getting into the hands of dangerous individuals.” ER 1693.⁵ The facts show that this law, too, works.

³ *California NICS Denials 1998-2018*, Everytown for Gun Safety, <https://everytownresearch.org/documents/2020/06/california-nics-denials.pdf/>.

⁴ Bureau of Alcohol, Tobacco, Firearms and Explosives, *Facilitating Private Sales: A Federal Firearms Licensee Guide*, at 2 (2016), <https://www.atf.gov/file/110076/download>; see Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS)*, <https://www.fbi.gov/services/cjis/nics> (last visited June 18, 2020) (noting the federal background check system “is all about saving lives and protecting people from harm—by not letting firearms fall into the wrong hands”).

⁵ The California Legislature prospectively amended Prop. 63 prior to its approval by the voters. See Appellant’s Opening Br. 6 n.1, Dkt. No. 14 (“State Br.”). References to Prop. 63 in this brief are to the law, and in particular its provisions that govern the purchase and sale of ammunition, as amended.

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Over its first seven months of application, Prop. 63 has “stopped more than 750 prohibited people from purchasing ammunition, and likely deterred countless others from even trying.” State Br. 1; *see* ER 237, 248-49, 251, 255. And, as the Attorney General recently announced, it has also directly led to the seizure of dozens of illegal firearms, “including assault weapons and ‘ghost’ guns—weapons unable to be traced because they have no serial number”—as well as illegal drugs, tens of thousands of rounds of ammunition, and more than 120 magazines, including more than thirty large-capacity magazines.⁶

Everytown does not submit this amicus brief, however, to reiterate the efficacy of background checks. That is covered in the State’s brief (at 29-30), and it is well settled.⁷ Everytown instead submits this brief to provide the Court with an account of the longstanding historical foundation for Prop. 63’s

⁶ *Attorney General Becerra Announces Recent Firearms Operations, Seizure of Ghost Guns, Assault Weapons, Drugs, and Tens of Thousands of Rounds of Ammunition*, State of Cal. Dep’t of Justice, Office of the Attorney General (May 19, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-recent-firearms-operations-seizure-ghost-guns>; Hannah Wiley, *Ammunition Background Checks in California Uncover ‘Ghost’ Guns, Heroin and More*, *The Sacramento Bee* (May 19, 2020), <https://www.sacbee.com/news/politics-government/capitol-alert/article242846551.html>.

⁷ *See generally* Everytown for Gun Safety, *Better Background Checks*, <https://everytown.org/issue/background-checks/> (last visited June 18, 2020).

ammunition-eligibility-check process—and to rebut the district court’s incorrect assertion that the law has “no historical pedigree.” ER 54.

The historical foundation for Prop. 63 lies in the historical pedigree of background checks generally. As this Court has recognized, “*Heller* did not differentiate between regulations governing ammunition and regulations governing the firearms themselves.” *Jackson v. City & County of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014). It follows that longstanding, lawful regulations applicable to the purchase of a firearm would similarly pass constitutional muster when applied to the purchase of ammunition. *Cf. Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (upholding law regulating public carry of firearms, which has “a number of close and longstanding cousins”); J. Blocher & D.A.H. Miller, *The Positive Second Amendment* 136 (2018) (“[L]ower courts have used analogy to extend *Heller*’s exclusions beyond those specifically identified in the case.”).⁸ Logic dictates that the regulations

⁸ Even the small number of dissenting judges who would prefer to interpret the Second Amendment to bar any firearm regulation not grounded in “text, history, and tradition”—a view contrary to the two-part Second Amendment test that is the law of this Circuit and every other Circuit that has weighed in—acknowledge that “the proper interpretive approach” to the historical inquiry involves “reason[ing] by analogy from history and tradition.” *See, e.g., Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis added).

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governing one should be similarly lawful when applied with equal force to the other.⁹

As discussed below, the types of regulations Prop. 63 imposes on the purchase and sale of ammunition—*i.e.*, background checks and their attendant recordkeeping, identification, and de facto waiting period requirements—have long been recognized as constitutionally sound restrictions on the purchase and sale of firearms. Due to the inextricable connection between firearms and ammunition, it follows that Prop. 63 should be treated, like these historical firearm regulations, as another example in this longstanding tradition.

As such, Prop. 63 is a “presumptively lawful regulatory measure[]” that falls outside the Second Amendment’s protections. *See* State Br. 34-36. It serves as the “most direct and efficient way” of enforcing “longstanding prohibitions on the possession of firearms by felons and the mentally ill.” *Id.*; *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see, e.g., Pena v. Lindley*, 898 F.3d 969, 1009 n.19 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (“[P]oint-of-sale restrictions such as background checks

⁹ The district court appears to have read *Jackson* to prohibit finding that *any* regulation applicable to ammunition has a longstanding historical pedigree. *See* ER 54 (quoting *Jackson*, 746 F.3d at 968). That is not the case. As the State’s brief explains (at 34-35), *Jackson* rejected the argument that ammunition falls entirely outside Second Amendment protection on historical grounds, but it in no way precluded concluding that a particular ammunition regulation is part of a longstanding historical tradition.

and waiting periods . . . are more easily defended as restrictions on 'the possession of firearms by felons and the mentally ill.'" (citation omitted)), *cert. denied*, No. 18-843 (U.S. June 15, 2020). And it is consistent with "laws imposing conditions and qualifications on the commercial sale of arms." State Br. 34, 36; *Heller*, 554 U.S. at 626-27; *see, e.g., Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016) (Thomas, C.J., concurring) (finding waiting periods, which were first enacted in the 1920s, to be a "longstanding condition or qualification on the commercial sale of arms").¹⁰

Under *Heller* and this Court's precedents, Prop. 63 is thus constitutional.¹¹ To hold otherwise would mean that ammunition receives *greater* constitutional protection than firearms. That simply cannot be. The district court's ruling should be reversed and judgment should be entered for the State.

¹⁰ Moreover, even if the Court chooses not to resolve this case at step one of its two-part Second Amendment inquiry, the longstanding history behind Prop. 63 further supports the State's position (at 36-37) that "intermediate scrutiny is appropriate" at step two of the inquiry. *See, e.g., Kachalsky*, 701 F.3d at 96 (concluding that intermediate scrutiny applied in challenge to law regulating the public carry of firearms "[b]ecause our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public").

¹¹ For the reasons set out in the State's brief (at 36-59), Prop. 63 is constitutional even if it falls within the Second Amendment's protections, and it does not violate the dormant Commerce Clause. Moreover, as the State explains (at 59-62), the balance of harms overwhelmingly favors the State.

ARGUMENT

As both the Supreme Court and this Court have emphasized, “longstanding” regulations are “traditionally understood to be outside the scope of the Second Amendment.” *Fyock v. City of Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015); *see Heller*, 554 U.S. at 626-27, 635 (noting that such “longstanding” regulations are treated as tradition-based exceptions by virtue of their “historical justifications”). These regulations need not “mirror limits that were on the books in 1791.” *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Instead, courts have found that even “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*, 779 F.3d at 997 (citing *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012)).

Prop. 63 sits firmly within this country’s well-established history of such regulation. Indeed, as discussed below, many similar laws date back to the same period as early prohibitions on sales to felons and individuals with dangerous mental illnesses—laws that *Heller* identified as “longstanding” and therefore presumptively valid. *See Heller*, 554 U.S. at 626-27, 635; *Skoien*, 614 F.3d at 639-40 (stating that courts have found “prohibitions on the possession

of firearms by felons and the mentally ill” to be sufficiently longstanding even though “[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938” and “the ban on possession by *all* felons was not enacted until 1961”); Robert J. Spitzer, *Gun Law History in the United States & Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 68-71, 75 (2017) (discussing restrictions on commercial arms sales in the early twentieth century); *see also Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 408 (7th Cir. 2015) (“*Heller* deemed a ban on private possession of machine guns to be obviously valid” even though “states didn’t begin to regulate private use of machine guns until 1927” and “regulating machine guns at the federal level” did not begin until 1934.).

Under these principles, Prop. 63’s ammunition-eligibility-check process does not implicate Second Amendment-protected conduct. Rather, as explained below, there is a longstanding tradition of analogous regulation, which by itself is sufficient to establish the constitutionality of the law. This “persuasive historical evidence,” *Jackson*, 746 F.3d at 968, demonstrates that the district court erred, that Appellees cannot succeed on the merits of their Second Amendment claims—and that this Court should accordingly reverse and enter judgment for the State.

I. Prop. 63’s Ammunition Background Check Requirement Is Closely Analogous to Longstanding Regulations on Firearms.

California’s ammunition background check requirement is consistent with longstanding and analogous requirements for firearms.

Firearm background check laws were first enacted in the early 20th century. In 1911, New York enacted the Sullivan Act, which prohibited dealers from selling a handgun to anyone who lacked a permit issued by law enforcement, *see* 1911 N.Y. Laws 442, 442-45, in order to “prevent the sale of pistols to irresponsible persons,” *see* Peter Duffy, *100 Years Ago, the Shot that Spurred New York’s Gun Control Law*, N.Y. Times (Jan. 23, 2011) (quoting law’s proponent). That same year, Delaware passed a law that forbade the sale of firearms to minors or intoxicated individuals. *See* Vol. 26 Del. Laws 28, 28-29 (1911). The statute also required an investigation into a gun purchaser’s background, prohibited the sale of a firearm until “the purchaser ha[d] been positively identified,” and imposed extensive recordkeeping requirements on firearms dealers. *See id.* at 29.¹² Colorado enacted similar legislation in 1911, requiring commercial gun dealers to keep detailed records on purchasers of

¹² In 1919, Delaware enhanced its identification provision by requiring that two witnesses positively identify a firearm purchaser before a sale could be completed. *See* Vol. 30 Del. Laws 55, 55-56 (1919).

firearms and to share these records with law enforcement. *See* 1911 Colo. Sess. Laws 408, 409.

In the ensuing years, several more states adopted legislation that provided standards to guide law enforcement investigations into gun purchasers' backgrounds. Oregon enacted a law in 1913 requiring a would-be handgun buyer to first acquire a permit to purchase, and before a magistrate would issue a permit, an applicant had to prove his good character by providing affidavits signed by two "reputable freeholders" testifying to the applicant's "good moral character." 1913 Or. Laws 497. A 1918 Montana law required registration of all firearms and prohibited certain sales unless law enforcement issued a permit after an investigation that concluded a gun buyer was "of good moral character and [did] not desire such fire arm or weapon for any unlawful purpose." 1918 Mont. Laws 6, 7. And, over the next few years, North Carolina, Missouri, and Arkansas enacted comparable legislation. *See* 1919 N.C. Sess. Laws 397, 398 (prohibiting firearm sales until a clerk of the Superior Court is satisfied of the "good moral character of the applicant"); 1921 Mo. Laws 691, 692 (requiring the sheriff to investigate a purchaser's background); 1923 Ark. Acts 379, 380; repealed by 1925 Ark. Acts 1047, 1047 (requiring a permit which was issued only after law enforcement concluded the purchaser was "of good character").

In the wake of this initial wave of laws, the U.S. Revolver Association (“USRA”), a “non-commercial organization of amateur experts in the use of revolvers,” began drafting and urging the adoption of uniform firearm legislation to combat a growing wave of violence (the “USRA Model Act”). Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767 (1926). USRA Vice President Karl T. Frederick, who also later served as president of the National Rifle Association, served as “one of the draftsmen” of the proposed legislation. *Nat’l Conf. of Comm’rs on Uniform State Laws, Third Report of the Comm. on a Uniform Act to Regulate the Sale and Possession of Firearms, Handbook Proceedings*, 36th Ann. Conf. 571, 573 (1926) (“1926 Conference Report”). Among the regulations included in the USRA Model Act were (i) a prohibition on the possession of pistols and revolvers by felons and noncitizens; (ii) a requirement that sellers transmit detailed sales records to local law enforcement; and (iii) a one-day waiting period between the application to purchase a firearm and receipt of that firearm. *See* Imlay, *supra*, at 767. The recordkeeping and waiting period requirements enabled local law enforcement to conduct their own background check investigation and prevent purchases prohibited by law. *See id.*

Between 1923 and 1925, several states—including California—passed laws modeled on the USRA Model Act. *See* 1923 Cal. Stat. 695, 696-97, 701;

1923 Conn. Pub. Acts 3707, 3707-10; 1923 N.D. Laws 379, 380-82; 1923 N.H. Laws 138, 138-39; 1925 Ind. Acts 495, 495-98; 1925 Or. Laws 468, 468-71. During the same period, other states continued to enact laws modeled after New York's Sullivan Act, requiring a law-enforcement-issued permit to purchase firearms. *See* 1927 Mich. Pub. Acts 887, 887-88 (requiring applicants to demonstrate that they had not been convicted of a felony or adjudicated insane); 1927 N.J. Laws 742 (limiting purchase permits to people "of good character and ... good repute in the community," and increased the waiting period from one day to seven days to facilitate background investigations); 1925 Haw. Sess. Laws 790, 793 (requiring purchasers to obtain pre-approval from law enforcement before they could purchase a firearm); 1927 Mass. Acts 413, 415-16 (same).

Then, in 1926, the National Conference of Commissioners on Uniform State Laws (the "Conference") selected the USRA Model Act "as the model of the draft of the Uniform Act," because it had "already gained ground" in the states. *Nat'l Conf. of Comm'rs on Uniform State Laws, The Uniform Fire Arms Act, Handbook Proceedings*, 40th Ann. Conf. 563, 569 (1930) ("1930 Conference Report"). The Conference expressed its belief that "the provisions of the proposed law present no constitutional obstacles" and "constitute no radical changes in existing laws." 1926 Conference Report at 574.

Four years later, after some committee revisions of the USRA Model Act, the Conference approved the new Uniform Firearms Act (the “UFA”). Among other things, the UFA expanded the waiting period for a firearm purchase to forty-eight hours, to provide additional time for law enforcement to complete an investigation into the fitness of the purchaser. *See* 1930 Conference Report at 563-67. The UFA also prohibited the sale of firearms to “any person under the age of eighteen or to one [a seller] [had] reasonable cause to believe [had] been convicted of a crime of violence, or [was] a drug addict, an habitual drunkard or of unsound mind.” *Id.* And it required dealers to submit detailed purchaser information to law enforcement within six hours of an application so a background investigation of the purchaser could be conducted within the allotted 48 hours. *Id.*; *see also* Newman F. Baker, *Sportsmen Fight Sullivan Law*, 23 *J. Crim. L. & Criminology* 665 (1932) (discussing “the police investigation” that occurs during the 48-hour waiting period to ensure a purchaser has “a clean record as an upright citizen.”). The UFA was subsequently adopted in some form by Pennsylvania, South Dakota, Washington, and Alabama, and enacted by Congress for the District of

Columbia. *See* 1931 Pa. Laws 497; 1935 S.D. Sess. Laws 355; 1935 Wash. Sess. Laws 599; 1936 Ala. Laws 51; 47 Stat. 650 (D.C. July 8, 1932).¹³

This history reveals that the earliest background check requirements originated during the same period as the “prohibitions on the possession of firearms by felons and the mentally ill” that *Heller* deemed presumptively lawful by virtue of their lengthy history. *Heller*, 554 U.S. at 626; *see* Spitzer, *supra*, at 72, 75-76. Indeed, in most cases, background checks were mandated in the very same legislation that prohibited firearm possession by felons and the mentally ill. *See, e.g.*, 1923 Cal. Stat. 701, §§ 2, 9 (requiring background checks and prohibiting possession by felons); 1931 Pa. Laws 497, §§ 2, 8-9 (requiring background checks and prohibiting possession by those convicted of crimes of violence and those of unsound mind). Prop. 63’s ammunition eligibility check process is merely a continuation of that history and tradition, consistent with these “close and longstanding cousins.” *Kachalsky*, 701 F.3d at 91. For that reason alone, it is “outside the scope of the Second Amendment and thus presumptively lawful.” *Silvester*, 843 F.3d at 832 (Thomas, C.J., concurring)

¹³ Texas created a similar background check requirement to ensure that its prohibitions on gun ownership by unreliable or dangerous people were enforced, requiring purchasers to obtain a “certificate of good character” from a justice of the peace or judge before they could purchase a pistol. *See* 1931 Tex. Gen. Laws 447, 447-48.

(citing *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc)).

II. Aspects of Prop. 63 Attendant to Background Checks Likewise Have a Historical Pedigree.

A. Prop. 63’s Recordkeeping Obligations Are Consistent with Longstanding Historical Recordkeeping Obligations Regarding the Sale of Firearms.

Prop. 63’s requirement that dealers collect and retain records of ammunition sales is likewise consistent with the Second Amendment. Like the background check laws just discussed, laws mandating recordkeeping for firearm sales have existed for more than a century. Prop. 63 is a natural extension of this recordkeeping tradition and thus, under step one of the Second Amendment inquiry, constitutional.

Dealer recordkeeping laws date back to at least 1885, when Illinois required gun dealers to keep sales records, open to police, recording “the date of the sale,” “the name and age” of the purchaser and “the purpose for which it is purchased.” Merritt Starr & Russell H. Curtis, *Annotated Statutes of the State of Illinois in Force* (1885), Criminal Code Ch. 38, para. 90. In 1892, Congress passed a gun law for the District of Columbia that required gun dealers to “keep a written register of the name and residence of every purchaser” and to make a weekly report to the police of all gun sales or transfers. *An Act to Punish the*

Carrying or Selling of Deadly or Dangerous Weapons Within the District of Columbia, 27 Stat. 116 (July 13, 1892). Several states then followed suit. Delaware and New York first required dealers to keep records of gun sales in 1911. *See, e.g.*, Vol. 26 Del. Laws 28, § 4 (1911); 1911 N.Y. Laws 442, 444, § 2. Both states' laws required dealers to record the purchaser's name, age, occupation, address, and pistol permit number, as well as make and model of the weapon being purchased. *Id.* Iowa and Oregon were next in 1913. *See* 1913 Iowa Acts 307, 308-09, § 10; 1913 Or. Laws 497. And, by 1921, four more states had adopted recordkeeping requirements for firearms sellers.¹⁴

As discussed above, *see supra* Section I, in the years that followed, the USRA Model Act led to a number of new firearms regulations at the state level. These state laws—which included California law—imposed stringent recordkeeping requirements on firearms dealers. Starting in 1923, California required every person “in the business of selling firearms” to keep a record of each sale. 1923 Cal. Stat. 699, § 9. California gun retailers were required to log the purchaser's name, age, address, height, occupation, skin color, eye

¹⁴ *See, e.g.*, 1918 Mont. Laws 6 (“On sale or transfer into the possession of any other person such person shall immediately forward to the sheriff of the County in which such person lives the name and address of that purchaser and person into whose possession or control such fire arm or weapon was delivered”); *see also* 1919 Haw. Sess. Laws 167; 1919 N.C. Sess. Laws 397; 1921 Mo. Sess. Laws 691.

color, and hair color, as well as the purchased firearm's manufacturer, serial number, and caliber. *Id.* The State even created a specific form for retailers to use, specifying that the dealers were to keep the originals for their own records, and that a “[c]arbon duplicate must be mailed on the evening of the day of the sale” to the head of the municipal police department. *Id.* Connecticut, North Dakota, and New Hampshire all adopted similar laws that same year. *See* 1923 Conn. Pub. Acts 3707, § 5; 1923 N.D. Laws 381, § 10; 1923 N.H. Laws 138, § 8.

These recordkeeping laws based on the USRA Model Act were similar from state to state, reflecting their shared source material. *See, e.g.*, 1925 Ind. Acts 495.¹⁵ And, notably, every one required that the seller transmit a record of the sale to state or local officials. *Id.*

Prop. 63's recordkeeping requirement for ammunition sales is consistent with this long historical tradition of analogous requirements on the commercial sale of arms. That robust history further demonstrates that Prop. 63 does not fall within the scope of the Second Amendment right, and that Appellees cannot demonstrate any likelihood of success on the merits.

¹⁵ 1923 N.H. Laws 138, § 8; 1925 Mich. Pub. Acts 473; 1925 N.J. Laws 185, § 3; 1927 Mass. Acts 413; 1931 Pa. Laws 497, 499, § 9; 47 Stat. 650 (D.C. July 8, 1932); 1935 S.D. Sess. Laws 355; 1936 Ala. Laws 51, 53 § 9.

B. Prop. 63's Identification Requirements Are Consistent with Longstanding Firearm Sale Regulations.

Prop. 63's purchaser identification requirements are also consistent with longstanding firearm regulations.

Since at least the 1920s, in addition to requiring that dealers record identifying information about purchasers, firearm laws have mandated that a purchaser present some form of identification to the seller. California is no exception. As early as 1923, California required that a purchaser either be “personally known to the seller or shall present clear evidence of his identity.” 1923 Cal. Stat. 701, § 11. Numerous other states enacted similar requirements throughout the 1920s and 1930s.¹⁶ And, during this same time period, Congress enacted an identification statute for the District of Columbia, requiring the purchaser of a handgun to present “clear evidence of [the purchaser's] identity.” Act of July 8, 1932, 47 Stat. 650, ch. 465, § 10 (D.C. July 8, 1932).

¹⁶ *See, e.g.*, 1923 Conn. Pub. Acts 3707, 3708 (“No sale or delivery of any pistol or revolver shall be made unless the purchaser or person to whom the same is to be delivered shall be personally known to the vendor of such pistol or revolver or the person making delivery thereof or unless the person making such purchase to whom delivery thereof is to be made shall provide evidence of his identity.”); *see also* 1923 N.D. Laws 379; 1923 N.H. Laws 138, § 10; 1925 Ind. Acts 495 §11; 1925 Or. Laws 468; 1931 Pa. Laws 497, 500, § 11; 1935 S.D. Sess. Laws 355, 357; 1935 Wash. Sess. Laws 599, 602; 1936 Ala. Laws 51, 53, § 11.

Beyond these specific requirements, many of the statutes also emphasized the importance of proper identification by making the presentation of “false evidence” of one’s identity a crime. *See, e.g.*, 1925 Mich. Pub. Acts 473, 475-76, No. 313 §§ 9, 13; *see also* 1925 N.J. Laws 185, 187, ch., 64 § 2 (stating that giving false personal information shall be punishable by “high misdemeanor”); Act of July 8, 1932, 47 Stat. 650, ch. 465, § 11 (D.C. July 8, 1932) (“No person, shall, in purchasing a pistol . . . , or in purchasing a sawed-off shotgun, or blackjack within the District of Columbia, give false information or offer false evidence of identity.”). Identification requirements for firearms transactions have persisted into the modern era. *See, e.g.*, 18 U.S.C. § 922(t)(1)(C) (“[A] licensed dealer shall not transfer a firearm to any other person who is not [another dealer], unless . . . the transferor has verified the identity of the transferee by examining a valid identification document.”).

In short, Prop. 63’s requirement that a purchaser present identification is not novel or new. Rather, it is of a piece with “conditions and qualifications on the commercial sale of arms,” *Heller*, 554 U.S. at 626-27 & n.26, that have existed for a century. Such longstanding regulations are not within the scope of the right protected by the Second Amendment, and do not create a substantial likelihood that Appellees’ challenge will succeed on the merits.

C. Any Administrative Delays Occurring Under Prop. 63 Are Consistent with Historical Regulations.

Any delays incidental to completing Prop. 63's ammunition eligibility process are likewise fully consistent with historical tradition. As this Court has noted, "[t]here is . . . nothing new in having to wait for the delivery of a weapon." *Silvester*, 843 F.3d at 827. "[T]he ability to immediately exercise Second Amendment rights has no foundation in history." *Id.* at 831 (Thomas, C.J., concurring). And as there is nothing new, or unconstitutional, about having to wait for the delivery of a weapon, there is similarly no constitutional issue with any incidental delay in receiving ammunition.

In California, a one-day waiting period law was originally enacted in 1923. *See* Law of June 13, 1923, ch. 339, § 10, 1923 Cal. Stat. 695, 696. California was not alone. In all, a dozen states and the District of Columbia enacted waiting periods in the 1920s and 1930s.¹⁷ During the legislative debate

¹⁷ *See* Law of Mar. 7, 1923, ch. 266, § 10, 1923 N.D. Laws 379, 381; Law of June 2, 1923, ch. 252, § 7, 1923 Conn. Pub. Acts 3707, 3708; Law of Feb. 26, 1925, ch. 260, § 10, 1925 Or. Laws 468, 473; Law of Mar. 12, 1925, ch. 207, § 9, 1925 Ind. Acts 495, 497; Law of Mar. 12, 1925, ch. 64, § 4, 1925 N.J. Laws 185, 188; Law of Mar. 30, 1927, ch. 321, § 6(4)(b), 1927 N.J. Laws 742, 745; Law of June 11, 1931, No. 158, §§ 4, 9, 1931 Pa. Laws 497, 498-99; Law of Mar. 14, 1935, ch. 208, §§ 4, 8, 9, 1935 S.D. Sess. Laws 355, 356; Law of Mar. 23, 1935, ch. 172, §§ 4, 8, 9, 1935 Wash. Sess. Laws 599, 601; Law of Apr. 6, 1936, No. 82, §§ 4, 8, 9, 1936 Ala. Laws 51, 52; Law of Apr. 27, 1927, Act 206, §§ 4, 9, 1927 Haw. Sess. Laws 209, 211; Law of Apr. 27, 1927, ch. 326, §§ 2, 3, 1927 Mass.

(cont'd)

before enacting a forty-eight-hour waiting period for Washington D.C., Senator Arthur Capper remarked that the slight delay would not disturb “[t]he right of an individual to possess a pistol in his home or on land belonging to him.” 75 Cong. Rec. 12754 (June 13, 1932). The waiting period laws passed in this period were largely identical, as they were modeled on the USRA Model Act and later UFA, and like the incidental delays here they facilitated an investigation into the purchaser’s background. *See* Section I, *supra* (explaining that UFA required 48-hour waiting period to enable background check).

In the district court, the parties disputed the time taken to perform background checks. Ultimately, however, even the district court accepted that the average processing time for a “full Basic background check” in January 2020 was under 30 hours, ER 28—significantly shorter than the 48-hour period in the historical laws modeled on the UFA. In any event, for nearly a century, states and Congress have mandated significantly longer delays for an individual to take possession of a firearm to allow for the completion of a background check. Simply put, such a delay is “nothing new” and does not implicate the

Acts 413, 414; Act of July 8, 1932, ch. 465, §§ 1, 8; 47 Stat. 650, 652 (D.C. July 8, 1932).

(*cont’d*)

Second Amendment. For this reason, the district court erred in determining that the Appellees are likely to succeed on the merits.¹⁸

CONCLUSION

For the foregoing reasons, and those set forth by the State, the Court should reverse the district court's order granting Plaintiffs' motion, vacate the preliminary injunction, and enter judgment for the State.

Dated: June 19, 2020

Respectfully submitted,

By: /s/ Matthew E. Sloan

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¹⁸ Indeed, this Court has upheld under intermediate scrutiny a 10-day waiting period for firearm purchases. *Silvester*, 843 F.3d at 829.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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