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11 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
12 FRESNO DIVISION
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14 JEFF SILVESTER, BRANDON COMBS, THE CALGUNS 15 FOUNDATION, INC., a non-profit organization, and THE SECOND 16 AMENDMENT FOUNDATION, INC., a non-profit organization, 17 18 Plaintiffs, 19 vs. 20 KAMALA HARRIS, Attorney General 21 of California, and DOES 1 to 20, 22 Defendants.	Case No.: 1:11-CV-2137 AWI SKO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANTS' CLOSING BRIEF (Doc 89) Judge: Hon. Anthony W. Ishii Courtroom: 8th Floor, Room 2 Trial Date: March 25/26/27, 2014 Case Filed: Dec. 23, 2011 Argument: July 21, 2014 | 1:30 p.m.

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I. INTRODUCTION

Defendants make the only arguments they can in light of the evidence provided by their own witnesses at trial. They attempt to resuscitate their speculative argument that a market-based waiting period law (WPL) might have existed at the time the Second Amendment was ratified (1791) and/or incorporated via the 14th Amendment (1868) because guns were expensive and rare. Failing that, they attempt to resurrect the idea that the WPL should be subject to a deferential standard of review that both the Ninth Circuit and Supreme Court have rejected. Plaintiffs arguments are based on the facts presented at trial and the current state of the law in this Circuit.

The 31st Edition of State Laws and Published Ordinances - Firearms (ATF P 5300.5) is available at the ATF website maintained by U.S. Dept. of Justice: https://www.atf.gov/publications/firearms/state-laws/31st-edition/index.html This publication summarizes firearms laws in all 50 States, the District of Columbia, Guam, Northern Mariana Islands, U.S. Virgin Islands, American Samoa and Puerto Rico. A "Ready Reference" Table, from pgs. xi-xii of this publication is attached as Exhibit A.

The citations from the various jurisdictions, including any WPL statute, are also from this ATF Publication. Some of the "purchaser waiting period" entries in the table are actually time limits for issuing permits/licenses (e.g., NY, NC, PA, TN) and are not true waiting periods that are triggered by a transfer or sale of a firearm, and/or the WPL in a particular jurisdiction has been abrogated by the state's participation in the Federal NICS system (e.g., SD).

Although all jurisdictions are subject to the Federal NICS check, which we know is available 99.87% of the time and has a 91.52% Immediate Determination Rate [See generally Exhibit BO, and the testimony of Steven Buford, Assistant Bureau Chief. (TX Buford 163:2 - 286:25)]; only a handful of states impose point of purchase waiting periods; and most of those jurisdictions exempt from their WPLs

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any persons holding licenses, permits and certificates that are substantially identical to those held by Plaintiffs Silvester and Combs here in the state of California.

For example:

Connecticut – Conn. Gen. Stat. § 29-37a imposes a two week waiting period from the date of sale, but exempts "delivery at retail of any firearm to a holder of a valid state permit to carry a pistol or revolver issued under the provisions of section 29-28 or a valid eligibility certificate issued under the provisions of section 29-36f[.]"

District of Columbia – D.C. Code § 22-4508 is virtually identical to California law, right down to the exceptions for various law enforcement employees.

Florida – Fla. Stat. § 790.0655 imposes a 3-day waiting period. However Florida's WPL does not apply "[w]hen a handgun is being purchased by a holder of a concealed weapons permit as de-fined in s. 790.06."

Hawaii – Haw. Rev. Stat. § 134-2 (e) imposes a 14-day waiting period, but exempts long-gun purchases for one year for every person who has already obtained a permit to acquire any rifle for shotgun.

Illinois – Ill. Comp. Stat. § 5/24-3(A)(g) imposes only a 72 hour waiting period for handguns and a 24 hour waiting period for long guns. The Illinois statute has the usual exemptions for government employees in law enforcement.

Maryland – has a seven day waiting period that only applies to handguns and Assault Weapons. The purchase of long guns is exempt from the waiting period. Md. Code Ann., Pub. Safety §§ 5-123 – 5-125.

Minnesota – has no waiting period for long guns that are not classified as Assault Weapons. Possession of a License to Carry a Concealed Firearm exempts a Minnesota gun-owner from the Assault Weapon and Handgun waiting periods. A Minnesota handgun purchase permit requires an initial 7 day wait, and is then valid for a full year with no further waiting periods on subsequent purchases. Minnesota Statutes §§ 624.7131/624.7132.

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1 Nebraska – permits a chief of police or sheriff to take up to three (3) days to
2 conduct an investigation when a persons applies to purchase a handgun, and then
3 issues that person a certificate under Neb. Rev. Stat. § 69-2404. Once issued the
4 certificate is good for three years and qualifies the person to purchase any number
5 of handguns without a waiting period. § 69-2407. No certificate or waiting period
6 is required to purchase long guns.

7 New Jersey – has a waiting period for handguns, but not for long guns.
8 Alternatively, NJ has a permit process that takes 7 days but is valid for 90 days
9 allowing additional purchases without waiting periods. New Jersey Revised
10 Statutes 2C:58-3 *et seq.*

11 Rhode Island – has a seven day waiting period for gun purchases, but
12 exempts the waiting period if someone has a License to Carry a Concealed Firearm
13 in that state. R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-35.1, 11-47-35.2.

14 U.S. Virgin Islands – imposes a 48 hour waiting period on all firearms sales.
15 Virgin Islands Code § 466.

16 Washington – imposes a 5 business day waiting period for handgun purchase
17 unless the person holds a validly issued Washington Concealed Pistol Permit.
18 Wash. Rev. Code § 9.41.090 *et seq.*

19 Wisconsin – has a handgun only waiting period that is 48 hours and which
20 does not apply to private party transactions. There is no waiting period for long
21 guns. Wis. Stat. 175-35 *et seq.*

22 Two glaring points are raised by these inter-jurisdictional comparisons:

23 a.) Defendants failed to show that waiting period laws, like California's (and
24 the District of Columbia) are even part of the current national norm. They certainly
25 introduced no evidence that a WPL was ever part of the fabric of American firearm
26 regulations for any part of the nation's history during ratification and incorporation
27 of the Second Amendment. One may infer that California's paternalistic
28 interference with gun purchases, even for people that the state has already deemed

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1 trustworthy, is based on California's gun laws incubating (or metastasizing,
2 depending your point of view) in a state with no "right to keep and bear arms"
3 provision in its state constitution to provide check on regulatory overreach. *See*
4 *Kasler v. Lockyer* 23 Cal. 4th 472, 481 (2000). It is questionable whether *Kasler* is
5 still good law after the Supreme Court's decision in *District of Columbia v. Heller*,
6 554 U.S. 570 (2008) and *McDonald v. City of Chicago* (2010) 130 S.Ct. 3020. The
7 point of this lawsuit is to bring California's laws into compliance with the ideals of
8 the U.S. Constitution that the state failed to address in its own charter.
9 b.) There isn't anything particularly significant about 10-days, even if
10 waiting periods for some gun purchases are constitutionally sound. The Defendants
11 admit in their Trial Brief that when first instituted in California, background
12 checks were required to be completed in three (3) days. In 1965, the waiting period
13 was extended to five days. Then in 1975 it was extended to 15 days and then it was
14 reduced to its present length of 10 days in 1997. [Trial Brief of Defendant Kamala
15 Harris, Doc #65, pgs. 4-5] California and the District of Columbia are the only two
16 jurisdictions to zero in on 10 days. Of the distinct minority of jurisdictions with a
17 WPL, most impose a period of anywhere from 48 hours to 5 business days, with the
18 ususal exemptions that include persons licensed to carry concealed weapons. Two
19 states (CN & HI) impose two-weeks, but also exempt long gun purchases and
20 persons with designated permits. Common sense, let alone constitutional scrutiny
21 compels the inquiry: Why 10 days? And in the context of this law suit, why 10-days
22 when the "cooling off" rationale is irrational for people who already have guns and
23 at least 20% of the million or so background checks for 2013 took only minutes?
24 California is reduced to the argument of a petty tyrant: "Because we said so."
25 The meat of this case lies in the Court's analysis of the facts adduced at trial
26 relating to the quality of evidence produced by the government and whether the
27 means California employs to stop impulsive acts of violence and conduct
28 background checks on gun sales is a constitutionally valid remedy. There are two

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1 recent cases that can assist this Court in making that analysis: *McCullen, et al., v.*
2 *Coakley, et al.*, Case No.: 12-1168 (U.S. Supreme Court, June 26, 2014) and
3 *Edwards, et al., v. District of Columbia*, Case No.: 13-7063 (U.S. District Court of
4 Appeals for the District of Columbia, June 27, 2014). Both of these brand new cases
5 analyze, in the context of the First Amendment, how a Court should adjudicate
6 overbroad statutes that impact fundamental rights.
7
8 **I. THE INSTITUTIONAL PLAINTIFFS HAVE STANDING.**
9 Both the Plaintiffs and the Court offered to resolve the institutional standing
10 issue during Mr. Hoffman's testimony by way of stipulation. The Defense declined
11 that invitation and insisted on establishing institutional standing through
12 testimony. Standing was established as to organization and representational
13 standing by way of testimony relating to Mr. Hoffman's membership in both
14 organizations (SAF & CGF), The Calguns Foundation's (CGF) involvement with
15 other Second Amendment cases, their commitment to protecting Second
16 Amendment rights for their members, and the un-controverted fact that virtually
17 all of its approximately 30,000 California members, including Mr. Hoffman, are
18 subject to the burdens of California's WPL. [TX Hoffman 119:3 – 126:17]
19 There was similar testimony from Mr.Gottlieb of the Second Amendment
20 Foundation (SAF). [See Doc 75, Gottlieb Deposition 18:8 – 19:23 for estimate of
21 SAF's California members and 22:3 – 34:23 for SAF's efforts taken outside of this
22 litigation on behalf of its members to advance Second Amendment rights.]
23 The leading case on institutional standing in the Ninth Circuit is *Fair*
24 *Housing Council of San Fernando Valley v. Roommate.com, LLC.*, 666 F.3d 1216 (9th
25 Cir. 2012). That case held that an organization has "direct standing to sue [when]
26 it showed a drain on its resources from both a diversion of its resources and
27 frustration of its mission. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.
28 2002)." *Id., at* 1219.

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1 The *Fair Housing* opinion did clarify that: " 'standing must be established
2 independent of the lawsuit filed by the plaintiff.' *Comite de Jornaleros de Redondo*
3 *Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (quoting *Walker v.*
4 *City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001)). An organization "cannot
5 manufacture [an] injury by incurring litigation costs or simply choosing to spend
6 money fixing a problem that otherwise would not affect the organization at all." *La*
7 *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083,
8 1088 (9th Cir. 2010); see also *Combs*, 285 F.3d at 903 ("[A]n organization cannot, of
9 course, manufacture the injury necessary to maintain a suit from its expenditure of
10 resources on that very suit . . . ." (internal quotation marks omitted))." *Id., at* 1219.
11 This was accomplished by CGF and SAF in much the same manner as the
12 *Fair Housing* plaintiffs: (1) Prior to commencing litigation, CGF and SAF
13 investigated Defendants' alleged violations of the Second Amendment, including
14 violations related to the 10-day WPL, and have spent resources to remedy those
15 violations. [TX Hoffman 119:3 – 126:17; Doc 75, Gottlieb Deposition 18:8 – 19:23,
16 22:3 – 34:23]. (2) Both Mr. Hoffman [TX 119:3-126:17] and Mr. Gottlieb [Doc 75:
17 38:24 – 43:24] testified about the educational programs and other litigation
18 strategies that both organizations sponsor.
19 The only rational inference to be drawn from these facts is that CGF and SAF
20 had to divert resources, independent of the costs of this litigation, because
21 Defendants conduct frustrates their organization's central mission – that of
22 defending law-abiding citizens' Second Amendment rights. The Court should find
23 that all of the named plaintiffs have standing.
24
25 **II. THE WPL BURDENS RIGHTS PROTECTED BY THE SECOND AMENDMENT.**
26 The cases cited by the Defendants for the proposition that all statutes are
27 presumed Constitutional dealt with a low level of scrutiny and did not involve
28 fundamental rights. *Town of Lockport v. Citizens for Community Action at Local*

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1 *Level, Inc.*, 430 U.S. 259 (1977) was an equal protection case dealing with a
2 non-suspect class (voters in a specific district) and only required rational basis
3 scrutiny. *People of State of New York v. O'Neil*, 359 U.S. 1 (1959) dealt with a
4 Privileges and Immunities Clause violation unrelated to the case at hand.

5 Defendants may wish for the Supreme Court cases of *District of Columbia v.*
6 *Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010),
7 and the relevant opinions from the various Circuit Courts, to be paper tigers, but
8 wishing doesn't make it so.

9

10 A. The Second Amendment Should be Analyzed Like the First.

11 The emerging analysis of Second Amendment claims is that they should
12 mirror how First Amendment claims are adjudicated, *Ezell v. City of Chicago,* 651
13 F.3d 684 (7th Cir. 2011); *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) and *Peruta*
14 *v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014). The first step is a historical
15 inquiry that seeks to determine whether the conduct at issue was understood to be
16 within the scope of the right to keep and bear arms at the time of ratification.
17 *Chovan*, 735 F.3d at 1137; *Ezell,* 651 F.3d at 702-03.

18 Defendants repeat the mistaken analysis from their motion for summary
19 judgment in their post-trial briefing. They concede that the WPL imposes **a** burden
20 on Silvester and Combs, they simply want the Court to jump the gun and conduct
21 the intermediate scrutiny test at step #1 by calling the burden "*de minimus*" in
22 order to short circuit the failure to carry their evidentiary burden, required by step
23 #2, at trial. [Def. Closing Brief Doc 89, page 4:11-17.]

24 This Court gave Defendants a road map on the burden of persuasion
25 regarding the first step of the *Ezell/Chovan/Peruta* test:

26 > Under the *Chovan* framework, the first step is to
27 > determine whether the challenged law burdens a right
> protected under the Second Amendment. The WPL
> prohibits every person who purchases a firearm from
28 > taking possession of that firearm for a minimum of 10

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> days. That is, there is a period of at least 10 days in which California prohibits every person from exercising the right to keep and bear a firearm. There can be no question that actual possession of a firearm is a necessary prerequisite to exercising the right keep and bear arms. Further, there has been no showing that the Second Amendment, as historically understood, did not apply for a period of time between the purchase/attempted purchase of a firearm and possession of the firearm. [fn.3: The Court notes that Harris has not refuted Plaintiffs ' assertion that waiting periods of any duration before taking possession of a firearm were uncommon in both 1791 and 1868. Cf. *Ezell*, 651 F.3d at 702-03; *Chester*, 628 F .3d at 680.] Cf. *Chovan*, 2013 U.S. App. LEXIS 23199 at *25 (" .. . we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors."). Although Harris argues that the WPL is a minor burden on the Second Amendment, Plaintiffs are correct that this is a tacit acknowledgment that a protected Second Amendment right is burdened. Therefore, the Court concludes that the WPL burdens the Second Amendment right to keep and bear arms.
>
> Order on Defendant's Motion
> For Summary Judgment
> (Doc #44, pg. 7:22 - 8:7)

The point that the Defendants keep missing is that "how much" of a burden the WPL imposes on the Second Amendment properly takes place under step #2 of the analysis. This is where, if they had <u>any</u> evidence, the Defendants could have made the argument that somehow public safety is still advanced by imposing an (alleged) *de minimus* burden of a 10-day waiting period, even though the state has the ability to conduct instantaneous background checks for some people and "cooling off" periods are nonsensical for people who already have guns. Based on the evidence adduced a trial, this would still be a flawed argument, but at least it would be made at the appropriate juncture of the required analysis.

Defendants' other arguments relating to step #1 of the *Ezell/Chovan/Peruta* analysis also lacks merit.

The 90 year-old 1-day WPL law that Defendants try to conflate with the current 10-day WPL [at page 5:7-12 of their brief] is still not a long-standing law that was in existence in 1791 or 1868. Furthermore, the uncontradicted testimony

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at trial is that California gun buyers are overwhelmingly approved for gun purchases and therefore not presumptively subject to mental-health restrictions on their rights. (See Doc 89, 5:9-12) With a 98.9% approval rate[1] (i.e., not felons, not on probation, not a violent misdemeanant, not subject to restraining orders, not subject to mental health restrictions, not under indictment, etc...) California gun-buyers appear, on a per capita basis, to be more law-abiding than the California State Senate.[2]

The final argument that Defendants make for why WPLs don't infringe the Second Amendment is fatally and doctrinally flawed. Even in the abstract, the idea that because guns were expensive and rare in 1791 and 1868, and therefore based on those market conditions, the people who ratified the Second and Fourteenth Amendments would have enacted WPLs if they had thought of them, is ridiculous on its face.

Abortions were rare in 1791 and 1868, and depending upon the statistical metrics employed, they may be rare today. That fact says nothing about their constitutionality or about any constitutionally valid regulation of that right. The capital investment in printing presses, paper and ink in 1791 and 1868 was undoubtably substantially more than the cost of a firearm, lead ball and powder. That fact says nothing about freedom of the press. Until *Gideon v. Wainwright*, 372

[1] The actual number of background check requests for 2013 was 960,179. Total denials based on the purchaser being a prohibiting person were 7,371. An additional 2,814 denials were based on persons attempting to purchase more than one hand-gun in any 30 day period. (i.e., they were not a prohibited person, this is a limitation on the number of guns one person can purchase during any 30-day period) Even if 30-day denials are included in the total as a denial, the approval rate for gun purchases in 2013 exceeded 98.9%. See Trial Exhibit AP, Bates AG002394.

[2] With the conviction of State Senator Rod Wright in January of 2013, the concurrent indictment of State Senator Ronald Calderon (Washington Post, March 3, 2014, Reid Wilson) and the indictment while this trial was pending of State Senator Leland Yee (San Jose Mercury News, March 26, 2014, Staff writers) the ratio of State Senators who are eligible to purchase guns in this state is only 92.5%, whereas California gun-buyers are approved at a rate of 98.9%.

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U.S. 335 (1963) addressed the plight of indigent criminal defendants, lawyers were expensive in 1791 and 1868, and still are for civil litigants and criminal defendants with means. That fact says nothing about the Sixth Amendment right to counsel.

Rights are not diminished by the private actions of the market. The touchstone of analyzing a civil rights violation is the finding of "state action" – for that is what violates rights and makes those violations actionable in our courts, and then only when a government practice or policy is the cause of the deprivation. *See generally Shelley v. Kraemer*, 334 U.S. 1 (1948). Plaintiffs are not complaining about the unavailability or cost of the firearms they want to purchase. They brought this lawsuit because they want access to property they already purchased, but must wait 10 days to take possession of.

B. Regulations of Fundamental Rights Must Look to State Action

An example of a contemporaneous longstanding regulation that modifies the concurrently ratified constitutional rights can be found in *United States v. Ramsey*, 431 U.S. 606, 616-617 (1977):

> [...] The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures on September 25, 1789, 1 Stat. 97, had, some two months prior to that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29. Section 24 of this statute granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed…." This acknowledgment of plenary customs power was differentiated from the more limited power to enter and search "any particular dwelling-house, store, building, or other place…" where a warrant upon "cause to suspect" was required. The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest. [footnotes omitted]

Because the Defendants produced no competent evidence during the trial that government regulations imposed waiting period on firearms purchases during the periods of 1791 and 1868, there is no reason for this Court to revisit its decision from its order denying summary judgment.

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1 **III. THE WPL DOES NOT SURVIVE INTERMEDIATE SCRUTINY.**

2 There is no such animal in the Ninth Circuit, or in any jurisdiction for that
3 matter, as "lenient heightened scrutiny." The Supreme Court in *Heller* and
4 *McDonald* already rejected the idea of treating the Second Amendment as a lesser
5 fundamental right subject to some watered down version of constitutional analysis
6 by judges considering these issues.

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> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (per curiam). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very product of an interest balancing by the people--which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

21
22

> *District of Columbia v. Heller* (2008)
> 554 U.S. 570, 634-35

23 And from *McDonald v. City of Chicago* (2010) 130 S.Ct. 3020, 3046-3047
24 (footnotes omitted):

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> [...] Throughout the era of "selective incorporation," Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. See, *e.g., Roth v. United States*, 354 U.S. 476, 500-503, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) (Harlan, J., concurring in result in part and dissenting in part);

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Mapp, supra, at 678-680, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (Harlan, J., dissenting); *Gideon*, 372 U.S., at 352, 83 S. Ct. 792, 9 L. Ed. 2d 799 (Harlan, J., concurring); *Malloy*, 378 U.S., at 14-33, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (Harlan, J., dissenting); *Pointer*, 380 U.S., at 408-409, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (Harlan, J., concurring in result); *Washington*, 388 U.S., at 23-24, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (Harlan, J., concurring in result); *Duncan*, 391 U.S., at 171-193, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Harlan, J., dissenting); *Benton*, 395 U.S., at 808-809, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (Harlan, J., dissenting); *Williams v. Florida*, 399 U.S. 78, 117, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) (Harlan, J., dissenting in part and concurring in result in part).

Time and again, however, those pleas failed. Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents' argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as amici supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." Brief for State of Texas et al. as Amici Curiae 23.

Municipal respondents and their amici complain that incorporation of the Second Amendment right will lead to extensive and costly litigation, but this argument applies with even greater force to constitutional rights and remedies that have already been held to be binding on the States. Consider the exclusionary rule. Although the exclusionary rule "is not an individual right," *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496, 504 (2009), but a "judicially created rule," *id.*, at ___, 129 S. Ct. 695, 172 L. Ed. 2d at 504, this Court made the rule applicable to the States. See *Mapp*, supra, at 660, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. The exclusionary rule is said to result in "tens of thousands of contested suppression motions each year." Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J. Law & Pub. Pol'y, 443, 444 (1997).

Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23-31. In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be

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> determined by judicial interest balancing, 554 U.S., at ___-___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, and this Court decades ago abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," *Malloy*, *supra*, at 10-11, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (internal quotation marks omitted).

As was argued in our opening brief, it is not necessary for this Court to choose between a strict or intermediate scrutiny analysis if the challenged statutes won't survive the intermediate analysis.

Exactly that approach was adopted by the D.C. Circuit Court of Appeals in the recent case of *Edwards, et al., v. District of Columbia*, Case No.: 13-7063, which was decided on the Friday before this brief was due. "We need not determine whether strict scrutiny applies, however, because assuming the regulations are content-neutral, we hold they fail even under the more lenient standard of intermediate scrutiny." *Id.,* page 7 of the slip opinion.

Since, as noted above, the emerging analysis of Second Amendment claims is that they should mirror how First Amendment claims are adjudicated, *Ezell v. City of Chicago,* 651 F.3d 684 (7th Cir. 2011); *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) and *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014). The *Edwards* case provides a provident example of how the evidence in an intermediate scrutiny case is to be evaluated. One of the issues in *Edwards* dealt with a challenge by a tour operator to a 100-question exam that tour guides had to pass in order to obtain a license to discuss Washington, D.C.'s architecture and history with their customers. The *Edwards* plaintiffs conducted tours of that city on a Segway, which is self-balancing, personal-transport vehicle. As part of the service of renting these vehicles, the plaintiffs would also provide cultural information about the Nation's Capitol while they scooter around that City.

Like this case, the plaintiffs in *Edwards* did not challenge the premise that the government's interest was substantial. But that does not end the inquiry.

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> [...] To satisfy narrow tailoring, the District must prove the challenged regulations directly advance its asserted interests. See *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) ("There must be a direct causal link between the restriction imposed and the injury to be prevented."). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); see also *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2002) (noting that courts "closely scrutinize challenged speech restrictions to determine if they indeed promote the Government's purposes in more than a speculative way").
>
> [...] That said, the burden remains on the District to establish the challenged regulations' efficacy, and a regulation cannot be sustained "if there is little chance that the restriction will advance the State's goal." [Citing *Lorillard Tobacco Co. V. Reilly*, 533 U.S. 525, 566
>
> *Edwards v. District of Columbia*
> Case No.: 13-7063, Slip Opinion at 11, 12

The *Edwards* court went onto analyze the evidence adduced in that case and the government came up short for the same reasons that this Court should reach the conclusion that a 10-day WPL is overbroad as applied to Plaintiffs and people similarly situated; i.e., because a waiting period cannot address the harm of impulsive violence if a person already has a gun, and because there is no rational basis for delaying the delivery of a sold firearm for 10 days to conduct a background check, when at least 20% of background checks are for practical purposes - instant.

In a second case decided the Thursday before this brief was due, the U.S. Supreme Court struck down a buffer-zone that regulated conduct and speech around abortion clinics because those zones burdened substantially more speech than was necessary to achieve the government's asserted interest. *McMullen, et al. v. Coakley, et al.*, Case No.: 12-1168 (June 26, 2014). In both the *Edwards* case and *McMullen*, the Court engaged in multiple speculations about the many ways government can address their stated interest in narrow terms. This Court doesn't even have to engage in that kind of speculation.

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1 California already has multiple safety-net programs to identify gun-owners
2 who become prohibited. The State not only gets involved during the process of a
3 person acquiring a firearm, it also has a system for continuing to monitor the
4 eligibility of those gun owners who are known to the state to possess firearms. That
5 system is the Armed and Prohibited Persons System (APPS). Its specific purpose is
6 to identify people who are known to the State of California to have a firearm who
7 have a subsequent prohibiting event (conviction, mental health hold, restraining
8 order, etc…) and, therefore, should not have a gun. [TX Graham 420:11-16.] [TX
9 Orsi 307:7-12] The APPS database updates itself every day with data from the
10 Department of Justice databases relating to firearms (except for NICS [TX Lindley
11 476:12]) and generates reports for further investigation if it obtains a match as
12 described in the DROS background check. [TX Orsi 304:4-23] The APPS system is
13 funded (currently with $24,000,000) through the fees paid by California gun-buyers
14 through their DROS fees. [TX Graham 426:6-23] In sum, where the DROS
15 Background check is designed stop somebody from getting a firearm, the APPS
16 system is designed to get a firearm from somebody who has become prohibited. [TX
17 Lindley 497:10-15]

18 The existence of this "safety-net" system is relevant to the Court's inquiry
19 about whether California's WPL is overbroad in trying to address the government's
20 legitimate objectives for addressing public safety through its databases and systems
21 for monitoring gun sales and current gun ownership.

22 Narrow tailoring of the government's means is essential to survival of even
23 important government policies that burden fundamental rights. In this case, the
24 government offers one justification for its WPL on the grounds that it will prevent
25 impulsive acts of violence (assault, homicide and suicide) and that the waiting
26 period acts as a kind of cooling off period. But the Defendants offer no evidence, or
27 even the hint of a hypothesis, that this cooling off period to purchase a new firearm
28 would deter an impulsive act of violence by someone who already has a gun in their

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possession. Instead their argument appears to be based on the assertion that the highly motivated and competent employees of the Bureau of Firearms, some of whom testified at trial, are incompetent or that the Department of Justice's systems and databases cannot be trusted to render reliable or useful information. Which invites the question: Why have Californians been required to register all handguns since 1996 and all long guns since January 1, 2014 if the data is unreliable? In fact the Special Agent who has to access this information for law enforcement purposes considers the data base to be reliable. [Graham TX 442:19 – 443:16]

The Defendants' second[3] justification for the WPL is that it takes time it takes to conduct background checks. The gravamen of this prong of Plaintiffs' constitutional challenge is the length of time it takes to conduct a background check. The thrust of our challenge is that if there is no reason to impose a "cooling off" period (because the gun-buyer already has guns), then the newly purchased firearm should be released upon approval of the background check instead of the arbitrary policy of 10 days. And that holders of certain licenses and permits should be exempt from the 10-day wait in the same manner as the 18 statutory exceptions.

Indeed, Plaintiffs are quite puzzled that Defendants keep mis-characterizing their arguments regarding the APPS system. Plaintiffs are not suggesting that APPS replace the DROS background check system. Plaintiffs were responding to Defendant's wildly speculative assertion that goes something like this: ***"What if someone with a CCW, or COE, or someone who already has guns becomes prohibited?"*** Plaintiffs' response is that the APPS system was passed into law, funded by law-abiding gun-buyers through their DROS fees and is being

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[3] Defendants – again – try to bootstrap a third justification for the 10-day waiting period for the alleged purpose of investigating and stopping straw purchases. This canard was addressed in Plaintiffs prior brief (Doc #93, fn. 1). The matter can be put to rest by the testimony of Agent Graham at TX 409:21– 412:11 wherein he stated that he had authority to intercede in a transaction to conduct additional investigation into a potential straw purchase. And that AB 500 permits a transfer to be delayed for up to 30 days for additional investigation. The straw-man investigation justification for the WPL is itself a straw-man.

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1 implemented to address exactly that problem. What was surprising during the trial
2 was the disclosure of additional tools available to the State to address "subsequent
3 disqualifications" specifically aimed at permit holders like Silvester and Combs.

4 Both the CCW held by Plaintiff Silvester [no more than 2 years, Penal Code §
5 26220] and the COE held by Plaintiffs Combs [annually, TX Combs 61:8] must be
6 renewed on a regular basis. Furthermore, Deputy Bureau Chief Buford testified
7 that COEs and CCWs, because the Department of Justice monitors these
8 permits/licenses/certificates, they are subject to a procedure called "rap-back." [TX
9 Buford 221:21- 225:17] The "rap-back" system is a process for positive identification
10 of a person based on the fingerprints that are already on file with the Department.
11 The rap-back system is used to notify the Department of the arrest of any person
12 with fingerprint records on file with the Department. As Bureau Chief Lindley
13 went on to explain starting at TX 492:7:

14 > A. We have a system which, in laymen's term, is called a
15 > rap-back system.
16 > Q. Can you explain what that is?
17 > A. Based on the person's submitted fingerprints, if their
18 > name comes up through the criminal history system as being
19 > arrested, that goes into the system and would flag. So I'll
20 > use myself as an example.
21 > Q. All right.
22 > A. Let's say that last night, I was arrested for domestic
23 > violence. Taken down to county jail, my fingerprints were
24 > rolled. This morning, DOJ would have been notified by our own
25 > system that I was arrested for domestic violence, which
26 > potentially could be a prohibiting offense if I'm convicted or
27 > plead guilty to it. So that allows that agency to take some
> action, especially since I'm a police officer, maybe to remove
28 > me from the field, put me on admin leave, but they're notified
> of that arrest.
> […]
> A. Rap-back is designed for people that we have fingerprints
> on. People that go into APPS, we might not necessarily always

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> have fingerprints on them because they're contained in different databases. Like our mental health database, restraining order database, or the wanted persons database. Rap-back mainly deals with the people who are in the criminal history system, and the CII number and that information goes in and is part of the criminal history. So if you ran a criminal history on me, you'll only find that I have the CII number and the two agencies that I used to be employed with. DOJ, which I'm currently, and National City previously.

In what has the tenor of grasping at straws, the Defendants also assert the highly speculative contention: ***"What if someone becomes prohibited during the 10 days?"*** This argument is nonsensical when taking into account other California laws addressing firearms acquisition:

1. Law Enforcement Gun Release – Under Penal Code §§ 33850 *et seq*., a person who has had their firearms taken into custody by a law enforcement agency, may use the administrative procedure outlined in this set of penal codes to get the firearms returned. This involves substantially the same background check on the person and the guns that is performed at a Firearm Dealer. Once the Department of Justices sanctions the return of the firearms, the clearance letter issued to the gun-owner gives them 30 days to retrieve his/her firearms from the agency that is holding the weapons. [See also BOF form 119]
2. California DROS Background is Good for 30 days – Under Penal Code § 26835(f) the gun-buyer has 30 days to pick up the firearm that they were cleared to purchase. By extrapolation, that means an additional 20 days can lapse after the initial 10-day waiting period and expiration of the background check for the gun-buyer to become disqualified.
3. APPS System – If Plaintiffs' theory is that people with CCW permits, COEs and those who already have a gun in the AFS system should be exempt from the WPL, then the utility of delaying the sale of a new

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gun for 10 days, if Agent Graham must still go out and seize firearms already owned due to a failed background check, is an impotent gesture.

In other words, the State already acts like it can trust gun-owners for at least 30 and 20 days after a clearance for the reacquisition of seized firearms and for any delay after the initial 10 day wait, respectively; by what logic are CCW permit holders like Mr. Silvester and COE certificate holders like Mr. Combs any less trustworthy?

IV. THE COURT CAN DEFER THE ADJUDICATION OF PLAINTIFFS' VIABLE AND COMPELLING EQUAL PROTECTION CLAIMS

Our suggestion that the Court can defer, or moot Plaintiffs' Equal Protection claims is not a waiver of the claim, but an attempt to focus the inquiry and approach the problem presented by this overbroad statute in the most conservative way possible. In footnote 2 of their closing brief, Defendants cite to a statement by Plaintiffs' counsel that he did "not necessarily disagree" with the assertion that invalidation of the exemptions may be a proper remedy. And although Plaintiffs do contend that the Court must either strike the statutory exceptions for the WPL under a Fourteenth Amendment Equal Protection analysis, or expand them to include Plaintiffs; we must admit that invalidation of peace officer exceptions to California's Assault Weapon Control Act was the remedy the Ninth Circuit imposed in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *reh'g denied* 328 F.3d 567 (9th Cir. 2003).

But that remedy is inappropriate in this case because merely striking the exceptions will not address the continued infringement of the Plaintiffs' (and those similarly situated) Second Amendment rights by a statute that is irrational as applied to their circumstances.

The better solution is to provide incentives for California gun owners to provide additional information (e.g., fingerprint based live scan background checks)

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through the permit, license and certificate process, and for the state to keep accurate records of firearms so that California can continue to do a good job of crime detection and prevention.

CONCLUSION

The anecdotal evidence does not even strongly suggest that actual violence is prevented by 10-day waiting periods. Nor have the defendants presented any evidence that a background checks can prevent anything more than the crime of a prohibited person obtaining a firearm, with only a strongly implied premise that this policy will have the derivative effect of stopping violence.

The trial testimony of Special Agent Graham is the best evidence on this point. [TX Graham 414:4 – 419:23] After describing in some detail a mass shooting that occurred in Cupertino, California in October of 2011. Agent Graham testified that the event terminated with Mr. Shareef Allman's suicide. The closing note on that line of questions was:

> Q. Would it be fair to say that this was an instance in which the background check and 10-day waiting period did not prevent violent acts?
>
> A. Yes.

Plaintiffs' prayer for relief as set forth in their proposed findings of fact and conclusions of law is a narrowly tailored approach to address the State's asserted interest. The Court should adopt Plaintiffs' Findings of Fact and Conclusions of Law.

Respectfully Submitted on June 30, 2014 by:

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/s/ Donald Kilmer
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DECLARATION OF E-SERVICE

Case Name: Silvester v. Harris

Court Name: U.S. District Court, Eastern District of California (Fresno)

Case No.: 1:11-cv-02137-AWI-SKO

I, Donald Kilmer, declare:

I am employed in the at 1645 Willow Street, Suite 150, San Jose, CA . I am 18 years of age or older and not a party to this matter.

I understand that all parties to the above-entitled case are represented by at least one attorney who is registered for electronic filing and service in the above-entitled court.

On June 30, 2014, I electronically filed and, therefore, to the best of my understanding, caused to be electronically served through the Court's ECF system:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANTS' CLOSING BRIEF (Doc 89)

The foregoing is true and correct and that this declaration was executed on June 30, 2014, at San Jose, California.

/s/ Donald Kilmer

Attorney for Plaintiffs.

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