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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION
2500 TULARE STREET | FRESNO, CA 93721

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

Plaintiffs,

vs.

KAMALA HARRIS, Attorney General
of California, and DOES 1 to 20,

Defendants.

Case No.: 1:11-CV-2137 AWI SKO

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF (PROPOSED) FINDINGS
OF FACT AND CONCLUSIONS OF
LAW AFTER BENCH TRIAL

Judge: Hon. Anthony W. Ishii
Courtroom: 8th Floor, Room 2
Trial Date: March 25/26/27, 2014
Case Filed: Dec. 23, 2011

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I. INTRODUCTION

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2 The flaw in Defendants' theory of this case can be summed up by the implied
3 premise of the current state of the law. That gun owners/purchasers, as a collective
4 group are to be presumed guilty of causing gun violence; therefore government
5 policies, like a 10-day waiting period to purchase a firearm can, and should, be
6 imposed on all gun owners/purchasers as a class.

7 But the evidence presented during a 3-day bench trial is that California gun-
8 buyers are overwhelmingly law-abiding. Mitch Matsumoto who works for the
9 Bureau of Firearms in the Purchaser Clearance Unit as a Criminal Identification
10 Specialist III, testified that for the year 2013 the state's system received more than
11 960,000 requests for background checks in connection with a gun sale and that total
12 denials for the same time period was 7,371, or less than 1 percent. [TX Matsumoto
13 331:12-332:14; see also Exhibit AP, Bates AG002394] That works out to more than
14 nine and one-half million days in 2013 that California gun-buyers had to wait 10-
15 days to take possession of their own property that was available and necessary to
16 exercise a fundamental right.

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

25 Put simply, the government can have no interest in enforcing a policy that
26 infringes the fundamental rights of persons already known to the state to be armed
27 and trustworthy, e.g., (1) gun owners with registered guns already in their
28 possession, and/or (2) gun owners with a Certificate of Eligibility to

1 acquire/own/possess firearms that is issued by the State's top law enforcement
2 agency (Defendants herein), and/or (3) gun owners with a state license to carry, on
3 their person at all times, a loaded and concealable firearms after that license has
4 been issued by the local chief of police or county sheriff.

5 Background checks for all gun buyers may be constitutionally appropriate.
6 10-Day Waiting Periods may be appropriate to keep first-time gun buyers (at least
7 for the first purchase in California) from committing impulsive violent acts and
8 because they are strangers to California's "gun-owner database." But 10-Day
9 Waiting periods for gun-owners who are already known by the state to be armed
10 and trustworthy is an irrational and overbroad infringement on the Second
11 Amendment.

12 II. STATEMENT OF THE CASE

13 As noted in the Order Denying Defendants' Summary Judgment Motion (Doc
14 #44), Plaintiffs have brought a focused Second Amendment challenge against
15 California's WPL. We contend that the State's imposition of a 10-day waiting
16 period before a law-abiding citizen can take possession of a firearm after a purchase
17 amounts to a kind of seizure and/or prior restraint by the Defendants of an
18 instrumentality necessary to exercise a fundamental right.

19 California justifies its WPL on two grounds: (1) that impulsive acts of suicide
20 and homicide perpetrated with firearms can be prevented if someone with a
21 troubled state of mind can be denied the immediate sale of a firearm, and (2) that to
22 prevent the sale of firearms to prohibited person [see Trial Exhibit CA] the state
23 must conduct a background check of the gun-buyer. The unstated premise for this
24 second justification of the WPL is that background checks take time to perform. [TX
25 Buford 167:3-10]¹

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28 During the trial defendants attempted to suggest a potential third justification for the WPL.
[TX 333:22-447:9] But Agent Graham's testimony on this issue was more descriptive of a
criminal investigation (conspiracy to engage in a straw purchase) than a need to address the

1 The issues presented by this case are narrow because Plaintiffs are not
2 challenging the State's system of background checks for any gun purchase, nor are
3 we challenging the waiting period for first-time gun buyers. Our contentions are
4 that the WPL infringes the Second Amendment rights of persons: (1) already known
5 to California to possess firearms and/or (2) who already hold certain renewable
6 licenses, certificates and permits that require the same (or greater) scrutiny of the
7 licensee than is required of a gun buyer at the time of a gun purchase.

8 Plaintiffs argue that the WPL burdens the rights of gun-buyers in these
9 categories because: (1) A WPL cannot stop an impulsive act of violence (suicide or
10 homicide) with a firearm if the perpetrator already has firearms in his/her
11 possession, and (2) A law that imposes a 10-day waiting period for the purposes of
12 conducting a background check is overbroad if the background check can be
13 conducted in less time, and in some circumstances - almost instantaneously.

14 To resolve this case, this Court should adopt the two-step analysis required
15 by Ninth Circuit law and look to the trial record for:

- 16 1. Evidence that Plaintiffs have made a *prima facie* showing of Second
17 Amendment infringement, and whether the Defendants have produced
18 persuasive evidence that would conclusively rebut that showing.
 - 19 a. The Plaintiffs must show some burden that the WPL imposes on
20 conduct protected by the Second Amendment.
 - 21 b. The Defendants must show that the regulation they are
22 attempting to justify existed contemporaneous with the Second
23 Amendment's ratification (1791) or its incorporation (1868).
- 24 2. If the Plaintiffs prevail on step #1, then the evidentiary burden shifts
25 to the Defendants to produce persuasive evidence that the WPL can be

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27 regulation of a sale to an actual buyer. Law-enforcement personnel already have access to
28 neutral and detached magistrates to secure warrants to seize property that may be the object or
instrumentality of a crime. The Court should proceed with its analysis based on the two
justifications for the WPL tendered by the Defendants since the beginning of this case.

1 justified under the applicable standard of review.

2 a. The Defendants must show that their WPL can stop a person
3 who already owns firearms from committing an impulsive act of
4 violence (suicide/homicide) with a firearm.

5 b. The Defendants must show that the WPL is no broader than is
6 necessary to achieve their objective of conducting background
7 checks to stop the sale of firearms to prohibited persons.

8 **III. STATEMENT/ANALYSIS OF FACTS**

9 **A. The Waiting Period is a Burden on Plaintiffs Second Amendment Rights.**

10 The WPL prohibits every person (except for person eligible under the
11 eighteen statutory exclusions) who purchases a firearm from taking possession of
12 that firearm for a minimum of 10 days. That is, there is a period of at least 10 days
13 in which California prohibits every most law-abiding persons from exercising the
14 right to keep and bear a firearm that they just purchased.

15 Defendants' own witnesses confirmed the burden during trial. For example,
16 there was testimony during the trial by Mitch Matsumoto who works for the
17 Bureau of Firearms in the Purchaser Clearance Unit as a Criminal Identification
18 Specialist III. He testified that for the year 2013 the state's system received more
19 than 960,000 requests for background checks in connection with a gun sale and that
20 total denials for the same time period was 7,371, or less than 1 percent. [TX
21 Matsumoto 331:12-332:14; see also Exhibit AP, Bates AG002394]

22 The exceptions to the 10-day waiting period – also the basis for Plaintiffs'
23 Equal Protection Claim – are a further clue to the law's burden (and irrationality):

- 24 1. Certain law enforcement transactions. Penal Code §§26950, 27050,
25 27055, 27060, 27065 (exempting §26815); §§27600, 27605, 27610,
26 27615, and 27650 (exempting §27540).
27 2. A dealer who delivers a firearm other than a handgun at an auction or
28 similar event. Penal Code §§26955 (exempts from §26815); §27655
(exempts from §27540).

- 1 3. Dealer-to-dealer transfers of firearms. Penal Code §§27110 and 27125
- 2 (exempts from §26815); §§27710, and 27725 (exempts from §27540).
- 3 4. Transfers of firearms by a dealer to him or herself. Penal Code §§26960
- 4 and 27130 (exempts from §26815); §§27660 and 27730 (exempts from
- 5 §27540.)
- 6 5. Transactions between or to importers and manufacturers of firearms.
- 7 Penal Code § 27100 (exempts from § 26815); § 27700 (exempts from
- 8 §27540).
- 9 6. Persons with a “short barrel rifle” or “short barrel shotgun” permit
- 10 pursuant to Penal Code § 33300. Penal Code §§ 26965 and 21740
- 11 (exempts from § 26815); §§ 27665 and 27740 (exempts from § 27540).
- 12 7. Persons who have an —assault weapons. permit pursuant to Penal
- 13 Code section 30500, *et seq.* Penal Code §21740 (exempts from §26815);
- 14 §27740 (exempts from §27540).
- 15 8. Persons who have a —machinegun. permit pursuant to Penal Code
- 16 section 32650 *et seq.* Penal Code §§26965 and 27140 (exempts from
- 17 §26815); §§27665 and 27740 (exempts from §27540).
- 18 9. Persons who have a —machinegun. license pursuant to Penal Code
- 19 section 32700. Penal Code §26965 (exempts from §26815); § 27665
- 20 (exempts from §27540).
- 21 10. Persons who have a —destructive device. permit pursuant to Penal
- 22 Code section 18900. Penal Code §26965 (exempts from §26815); §27665
- 23 (exempts from §27540).
- 24 11. Persons with curio and relic collector's licenses issued by the Bureau of
- 25 Alcohol, Tobacco, Firearms and who have a valid Certificate of
- 26 Eligibility issued by the California Department of Justice and only
- 27 when purchasing curio and relic firearms. Penal Code §26970 (exempts
- 28 from §26815); §27670 (exempts from §27540).
12. Transactions regarding firearms serviced or repaired by a gunsmith.
- Penal Code §27105 (exempts from §26815); §27705 (exempts from
- §27540).
13. Dealer sales to persons residing out-of-state. Penal Code §27115
- (exempts from §26815) and §27715 (exempts from §27540).
14. Deliveries to wholesalers. Penal Code §27120 (exempts from §26815);
- §27720 (exempts from §27540).
15. Loans by dealers who operate target facilities. Penal Code §27135
- (exempts from §26815); §27735 (exempts from §27540).

- 1 16. Certain loans of firearms for use as props. Penal Code §27000 (exempts
2 from §26815); §27745 (exempts from §27540).
- 3 17. Loans to consultants or evaluators. Penal Code §27005 (exempts from
4 §26815); §27750 (exempts from §27540).
- 5 18. Lawful transactions involving cane guns, firearms that are not
6 immediately recognizable as firearms, undetectable firearms, wallet
7 guns, unconventional pistols, and zip guns. Penal Code §21740
8 (exempts from §26815); §27740 (exempts from §27540).

9 Presumably the persons whose transactions are described by these exceptions
10 have convinced the legislature, by some methodology that is presently unknown,
11 that they will never become felons, never become violent misdemeanants, never
12 suffer a mental break-down, never engage in suicidal ideation or never commit an
13 impulsive violent act and therefore should not be burdened with a 10-day waiting
14 period. So if a WPL is not a burden, then why are the exceptions necessary?

15 The testimony of Bureau Chief for the Bureau of Firearms - Stephen Lindley
16 was that these exceptions are permitted for persons who are peace officers, and who
17 hold various Special Weapon Permits. Chief Lindley testified that many of these
18 exceptions were justified because of the extensive background checks that peace
19 officers and special permit holders are subject to. [TX Lindley 461:4 - 470:10]

20 Further evidentiary support for the burden the WPL imposes was presented
21 through the testimony of the Plaintiffs Jeffrey Silvester [TX Silvester 20:4-48:15]
22 and Brandon Combs [TX Combs 48:17-112:10]. That is why it rings true to say that
23 acquisition of a firearm is a necessary prerequisite to exercising the right keep and
24 bear arms. In *Andrews v. State*, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871) – cited
25 favorably in *District of Columbia v. Heller*, 554 U.S. 570, 608, 614 (2008), the High
26 Court of Tennessee found much in common between that State’s guarantee of the
27 “right to keep and bear arms” and the Second Amendment when it held:

28 The right to keep and bear arms, necessarily
involves the right to purchase them, to keep them in a
state of efficiency for use, and purchase and provide
ammunition suitable for such arms, and keep them in
repair. [...]

1 Therefore the Defendants must produce some evidence to overcome this
2 *prima facie* showing by the Plaintiffs by presenting convincing rebuttal evidence
3 that a WPL is such a long standing regulation of the rights secured by the Second
4 Amendment as to be presumptively valid.

5 The Defendants failed at that task because they did not demonstrate that
6 WPLs existed in 1791 or 1868. Rather, Defendants made an offer of proof that guns
7 were expensive and difficult to come by during the founding era and for some period
8 of time after that. But the Plaintiffs are challenging a law passed by the state of
9 California and administered by an agency of that government. Rights are not
10 violated by market conditions.

11 The case law in this Circuit requires this Court to look at how Second
12 Amendment rights and laws regulating those rights were understood during the
13 founding era and the period of 14th Amendment incorporation. An historical
14 inquiry into market conditions and the retail availability of firearms (even
15 assuming these hypotheses are true) is simply not relevant to these proceedings.

16 Defendants also presented this Court with a citation to a California law
17 enacted in 1923 that provided, "In no event shall any [pistol, revolver, or other
18 concealable firearm] be delivered to the purchaser upon the day of the application
19 for the purchase thereof, and when delivered such firearm shall be securely
20 wrapped and shall be unloaded." Cal. Stats. 1923, ch.339, § 10, p. 701; Deering's
21 General Laws (1924 ed.), Act 1970, § 10, p. 668.

22 Fatal to the Defendants' argument is that the 1923 statute, even assuming it
23 could be construed as a WPL, was not part of the fabric of the law of weapons in
24 1791 and/or 1868-which are the relevant time periods for evaluating regulations
25 trenching on the Second Amendment. Furthermore, the WPL was not applied
26 against all firearms purchases until very recently. See Plaintiffs' Trial Exhibit 06.
27 AB497 Processing Alternatives Feasibility Study – Report of Findings. May 1991 by
28 the California Department of Justice. Bates AG000766-AG000826.

1 Furthermore, in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), the
2 government attempted to argue that a federal statute banning people convicted of a
3 misdemeanor crime of domestic violence was a longstanding presumptively lawful
4 regulation. That Court disagreed and found that the government failed to produce
5 evidence that domestic violence misdemeanants have historically been restricted
6 from bearing arms. *Chovan*, 735 F.3d at 1137. The Court noted that the first
7 federal firearm restrictions regarding violent offenders was not enacted until 1938
8 and that "Chovan, who was convicted of simple misdemeanor assault under
9 California Penal Code § 273.5(a) - would not be restricted from possessing firearms
10 under" that statute.

11 This Court should similarly find that the 1923 statute, even if it is on point to
12 the WPL here, is not a long-standing regulation of Second Amendment rights that
13 was in effect at the time of the founding era or during the time of that Amendment's
14 incorporation via the 14th Amendment.

15 Based on the evidence presented during the trial, the Court should find for
16 the Plaintiffs on the threshold issue of whether the WPL violates the Plaintiffs'
17 Second Amendment rights. And based on that holding, the burden of producing
18 evidence that the challenged law passes constitutional muster now shifts to the
19 government. As will be set forth below, it should not be necessary for this Court to
20 choose between strict or intermediate scrutiny as the Court should find that the
21 WPL does not survive even the lesser intermediate scrutiny.

22 B. The WPL Cannot Deter Violence by People Who Already Have Guns.

23 The Court should reach the same conclusion after trial that it did after in its
24 Summary Judgment Order (Doc #44) on this issue. First, the Court can easily find
25 that deterring violence is an important (maybe even compelling) government
26 interest.

27 But the contest here is whether the means employed are sufficiently tailored
28 to prevent a constitutional violation.

1 The testimony from Assistant Bureau Chief Buford indicates that all
2 background checks access a database called the Automated Firearms System (AFS).
3 The bulk of the records contained in the AFS system are the state's Dealer Records
4 of Sale (DROS) that have occurred (at least with respect to handguns) since 1991.
5 [TX Buford 234:20 - 235:21] Furthermore the AFS system is available through the
6 California Law Enforcement Telecommunication System (CLETS) on a 24/7, 365
7 days per year basis. It is also available to police officers (who have the equipment)
8 in the field to alert them to the possibility of the presence of a firearm during any
9 public safety service call. [TX Buford 250:18 - 253:14]

10 It is clear from the evidence, at least for law-abiding gun owners who have
11 purchased and/or transferred handguns through a licensed dealer since 1991 (and
12 long guns since January 1, 2014, see TX Buford 181:22-182:1), that the State of
13 California has the means to immediately establish that fact with existing resources.

14 The Defendants made several offers of proof purporting to show that 'cooling
15 off periods' can deter suicide and other impulsive acts of violence. But the Plaintiffs
16 are not challenging the WPL for first time gun-buyers who presumably don't have
17 immediate access to a firearm. In that circumstance, being required to wait 10 days
18 to take possession (assuming the gun-buyer is not otherwise disqualified) may have
19 a deterrent effect on impulsive suicides or homicides. But again, only as applied to
20 first-time gun-buyers and/or persons whom the State cannot identify as already
21 owning a firearm.

22 Defendants' failure of proof with respect to the WPL as a 'cooling off period' is
23 more properly characterized as a failure of logic. As applied to individuals who
24 already own a gun, common sense suggests the obvious question: How can the WPL
25 'cooling off period' stop violence with a new gun if an individual already possesses a
26 firearm?

27 The equally commonsense conclusion that it can't is supported by the
28 testimony of Bureau Chief for the Bureau of Firearms - Stephen Lindley. As noted

1 above, Plaintiffs' suit also challenges the constitutionality of the WPL's exceptions
2 under the 14th Amendment's Equal Protection Clause. These exceptions are
3 permitted for persons who are peace officers, and who hold various Special Weapon
4 Permits. [TX Lindley 461:4 - 470:10] However Chief Lindley also had to admit that
5 peace officers commit suicide, special permit holders commit suicide, and people
6 visiting target ranges commit suicide. [TX Lindley 502:17-23] The sad fact is that
7 a WPL cannot stop a person from committing an impulsive violent act, even against
8 themselves, if they already possess the means to do so. The WPL cannot be
9 rationally justified as deterrent to suicide or homicide with a firearm for persons
10 who already own firearms.

11 C. 10 Days to Conduct Background Checks is Arbitrary.

12 The majority of the trial testimony and exhibits admitted into evidence
13 address California's computerized background check system. Background checks
14 for retail gun purchases through licensed dealers are mandated by federal law. The
15 National Instant Criminal Background Check System (NICS) is administered by
16 the U.S Department of Justice, Federal Bureau of Investigations. As of 2011, the
17 federal NICS system had achieved an availability rate of better than 99.87%, and a
18 91.52% Immediate Determination Rate. Individual states may opt out of the
19 national system (yet still have access to the national database) by demonstrating
20 that their own system meets or exceeds the requirements mandated by federal law.
21 California is such a state. See generally Exhibit BO, and the testimony of Steven
22 Buford, Assistant Bureau Chief at the California Department of Justice, Division of
23 Law Enforcement, Bureau of Firearms. [TX Buford 163:2 - 286:25]

24 The starting point of California's Bureau of Firearms Consolidated Firearms
25 Information System is the Dealer Record of Sale (DROS). In addition to the
26 requirement that firearm dealers obtain a federal firearms license through the
27 Federal BATFE, California imposes additional licensing requirements on retail
28 firearms dealers. Such dealers are required to obtain a Certificate of Eligibility

1 (COE) [TX Buford 221:12-17] and they must submit relevant information on a
2 gun-buyer at the point of sale though the DROS form/process and quarantine the
3 gun sold for 10 days before delivering the firearm to its new owner.

4 The current computerized DROS process starts with an electronic
5 transmission of the gun-buyer's information (which includes information on the
6 transaction firearm) to the Department. [TX Buford 171:20] Then the information
7 is run through a DMV verification to insure accurate identification information of
8 the DROS applicant. [TX Buford 171:21-172:3]

9 Next, the DROS application is run through the Automated Firearms System
10 (AFS) to insure that the firearm in question is not reported lost or stolen. [TX
11 Buford 173:10 - 175:15] The application is next run through multiple databases to
12 determine if the gun-buyer belongs to a category of prohibited persons. [TX Buford
13 175:24 - 176:3] Those databases include: The Automated Criminal History System
14 (ACHS) [TX Buford 176:9]; The California Restraining Order and Protective Order
15 System (CARPOS) [TX Buford 182:20]; The Wanted Persons System (WPS) [TX
16 Buford 184:5]; The Mental Health Firearms Prohibition System (MHFPS) [TX
17 Buford 185:20]; The Consolidated Firearms Information System (CFIS) [TX Buford
18 189:3]; and finally California checks the federal government's National Instant
19 Criminal Background Check System (NICS) [TX Buford 191:2].

20 California currently has four determinations made by the DROS/Background
21 Check System: (1) approved [the sale and delivery may proceed subject to the WPL],
22 (2) delayed [further investigation is necessary], (3) denied [the person is prohibited
23 under federal or state law from acquiring/possessing a firearm], and (4)
24 "undetermined." [TX Buford 231:25-232:15] A description of the computerized
25 process of the DROS/Background Check was provided through the testimony of
26 Donnette Orsi (currently with the California Department of Housing and
27 Community Development) who was previously employed by the California
28 Department of Justice as a Data Processing Manager during relevant time periods.

1 [TX 287:17 - 311:4; see also Exhibit CB]

2 Assistant Bureau Chief Buford admitted during the trial "[I]t is possible for a
3 DROS application to make it through all of the databases that we just mentioned
4 without there being any hits at all[.]" And that these DROS applications are called
5 "auto approvals." And that these "auto approvals" make up about 20 percent of all
6 DROS applications processed by the Department. [TX Buford 198:5-15]

7 That means that during the year 2013, when more than 960,000 DROS
8 applications were processed by the Department, at least 192,000 DROS applications
9 were "auto-approved." The testimony at trial from Buford and Orsi was consistent
10 that "auto-approvals" which make up more than 20% of all DROS determinations,
11 can take place within one hour [TX Buford 240:5] and in as little time as one
12 minute. [TX Orsi 308:17]

13 Additional testimony was provided that the DROS/Background Check
14 System is capable of accessing the AFS database, which reliably keeps track of
15 previous handgun purchases since 1996 and long gun purchases since January 1,
16 2014. [TX Graham 387:4-6, 442:3-443:8] Furthermore, Assistant Bureau Chief
17 Buford testified that the DROS/Background system can generate a response as to
18 whether an applicant also has a Concealed Carry Weapon (CCW) permit and/or a
19 Certificate of Eligibility (COE) and/or whether that person also has gun in the AFS
20 system. [TX Buford 280:16-24]

21 Plaintiff Silvester has obtained and maintains a Concealed Carry Weapons
22 (CCW) Permit issued by the Hanford Police Department. He also testified that the
23 permit process requires a background check, proof of training, a live scan
24 fingerprint (which means the State of California has a full digital copy of his
25 fingerprints on file) and demonstration of some degree of proficiency with a firearm.
26 [TX Silvester 23:8-24:18; see also Plaintiffs' Exhibit 05] California's statutory
27 requirements for obtaining a CCW Permit are set forth at Penal Code §§ 26150,
28 26155.

1 Plaintiff Combs has obtained and maintains a Certificate of Eligibility
2 (COE). This is a certificate issued by the California Department of Justice that
3 requires payment of a fee, a background check, and live scan fingerprint
4 submission. The certificate must be renewed annually. [TX Combs 60:14-61:22; see
5 also Plaintiffs' Exhibit 04] Although it may promulgate regulations, the California
6 Department of Justice has no discretion in the issuance of a COE, i.e., it is a "shall
7 issue" certificate after the appropriate background checks and submission of a live
8 scan set of fingerprints. [TX Lindley 494:4- 495:10; 510:16-511:12] The statutory
9 requirements for obtaining a COE in California are set forth at Penal Code § 26710.

10 Furthermore, both a CCW and COE generate a unique criminal justice
11 identification record that is based on the unique set of fingerprint records on file for
12 that individual. That unique identification record is known as a Criminal
13 Identification Index (number) or CII. The existence of a CII speeds up the process of
14 identifying a person when the California Department of Justice makes an inquiry
15 about them. [TX Buford 243:6-24] [TX Matsumoto 327:22]

16 The Defendants admit in their Trial Brief that when first instituted in
17 California, background checks were required to be completed in three (3) days. In
18 1965, the waiting period was extended to five days. Then in 1975 it was extended
19 to 15 days and then it was reduced to its present length of 10 days in 1997. [Trial
20 Brief of Defendant Kamala Harris, Doc #65, pgs. 4-5]

21 Conclusion: The 10 days are an arbitrary number and must be justified by
22 reference to real-world necessities. Put another way, the relevant inquiry for the
23 Court's resolution of this part of the case should be whether a mandatory minimum
24 of a 10-day waiting period is necessary to achieve the government's interest in
25 conducting a background check. The evidence presented at trial show that is does
26 not and that the only other justification for the WPL after an approval are the
27 "cooling-off" period and the statute itself. [TX Buford 244:5-12]

28 The most compelling support for the proposition that the WPL is not

1 necessary for background checks was the testimony of the Chief of the Firearms
2 Bureau - Stephen Lindley at TX Lindley at 508:9:

3 Q. Why not simply release firearms upon approval?

4 A. Because we have the 10-day waiting period as a cooling-off period as
5 well.

6 Q. All right, so the only thing that's stopping you from releasing a
7 firearm upon approval of the background check is the statute, and the
8 statute is based upon we still want a cooling-off period.

9 A. Once the background is approved?

10 Q. Yes.

11 A. Yes.

12 D. The APPS System and Rap-Back System Are Narrower Alternatives.

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

28 Furthermore, people who obtain CCW permits and COE certificates complete
the extra step of submitting full live scan fingerprints to the Defendants in order to

1 make themselves easily identifiable. Both the CCW [2 years, Penal Code § 26220]
2 and the COE [annually, TX Combs 61:8] must be renewed on a regular basis.

3 Deputy Bureau Chief Buford testified that COEs and CCWs, because the
4 Department of Justice monitors these permits/licenses/certificates, are subject to a
5 procedure called "rap-back." [TX Buford 221:21- 225:17] The "rap-back" system is a
6 process for positive identification of a person based on the fingerprints that are
7 already on file with the Department. The rap-back system is used to notify the
8 Department of the arrest of any person with fingerprint records on file with the
9 Department. As Bureau Chief Lindley went on to explain starting at TX 492:7:

10 A. We have a system which, in laymen's term, is called a
11 rap-back system.

12 Q. Can you explain what that is?

13 A. Based on the person's submitted fingerprints, if their
14 name comes up through the criminal history system as being
15 arrested, that goes into the system and would flag. So I'll
16 use myself as an example.

17 Q. All right.

18 A. Let's say that last night, I was arrested for domestic
19 violence. Taken down to county jail, my fingerprints were
20 rolled. This morning, DOJ would have been notified by our own
21 system that I was arrested for domestic violence, which
22 potentially could be a prohibiting offense if I'm convicted or
23 plead guilty to it. So that allows that agency to take some
24 action, especially since I'm a police officer, maybe to remove
25 me from the field, put me on admin leave, but they're
26 notified of that arrest.

27 [...]

28 A. Rap-back is designed for people that we have
fingerprints on. People that go into APPS, we might not
necessarily always 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 he
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.

1 The existence of this set of "safety-net" systems is relevant to the Court's
2 inquiry about whether California's WPL is overbroad in trying to address the
3 government's legitimate objectives for addressing public safety through its systems
4 for monitoring gun sales and current gun ownership.

5
6 **IV. ARGUMENT**

7 This case stands for the proposition that plaintiffs (and persons similarly
8 situated) who are:

- 9 (1) a person who already has a registered (i.e., they are known by the
10 state to be in lawful possession of a) firearm at his/her home; and/or
11 (2) a person licensed to carry a loaded and concealable firearms on their
12 person at all times by their local chief of police or sheriff; and/or
13 (3) a person who submits to yearly backgrounds checks and obtains a
14 Certificate of Eligibility to own/purchase/possess firearms from the
15 California Department of Justice;

16 are all equally as trustworthy as the 18 exceptions listed above and are therefor
17 entitled to the same exemption from the 10-Day Waiting Period.

18 Sometimes governments cannot avoid making classifications. But when
19 those classifications infringe a fundamental right, the Courts are required to
20 examine those classifications, and the underlying policies, with an exacting
21 scrutiny. A 10-day waiting period to exercise the "right to keep and bear" a firearm
22 that was just purchased, by someone who has already demonstrated to the State of
23 California that they are a trustworthy gun owner, is an infringement of the Second
24 Amendment as that right was understood in 1791 and 1868.

25 *District of Columbia v. Heller*, 554 U.S. 570 (2008) rejected a "collective
26 rights" interpretation of the Second Amendment in favor of a finding that the "right
27 to keep and bear arms" is a fundamental, individual right. This Court should reject
28 the "collective guilt" theory of gun control advanced by the State of California in

1 favor a more narrowly tailored remedy that will comply with the Constitution.

2 The Second Amendment reads: "A well regulated Militia, being necessary to
3 the security of a free State, the right of the people to keep and bear Arms, shall not
4 be infringed." U.S. Const. Amend. II. The Second Amendment right to keep and
5 bear arms is an individual right and a fundamental right that is incorporated
6 against states and municipalities under the Fourteenth Amendment. See
7 *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3042 (2010); *District of Columbia v.*
8 *Heller*, 554 U.S. 570, 595 (2008); *Nordvke v. King*, 681 F.3d 1041, 1043 (9th Cir.
9 2012) (en banc). The Second Amendment "protects a personal right to keep and
10 bear arms for lawful purposes, most notably for self-defense within the home."
11 *McDonald*, 130 S.Ct. at 3044; see also *Heller*, 554 U.S. at 630.

12 The Second Amendment's protection is not unlimited, and longstanding
13 regulatory measures such as "prohibitions on the possession of firearms by felons
14 and the mentally ill, or laws forbidding the carrying of firearms in sensitive places
15 such as schools and government buildings, or laws imposing conditions and
16 qualifications on the commercial sale of arms," are presumptively lawful.
17 *McDonald*, 130 S.Ct. at 3047; *Heller*, 554 U.S. at 626-27; *United States v. Chovan*,
18 735 F.3d 1127, 1133 (9th Cir. 2013).

19 Under the Ninth Circuit's two-step Second Amendment framework: (1) the
20 trial court asks whether the challenged law burdens conduct protected by the
21 Second Amendment, and (2) if so, the court determines whether the law meets the
22 appropriate level of scrutiny. See *Chovan*, 735 F.3d at 1136-38; see also *National*
23 *Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 700 F.3d
24 185, 194-95 (5th Cir. 2012) ("N.R.A."); *United States v. Chester*, 628 F.3d 673, 680
25 (4th Cir. 2010). The first step is a historical inquiry that seeks to determine
26 whether the conduct at issue was understood to be within the scope of the right to
27 keep and bear arms at the time of ratification. *Chester*, 628 F.3d at 680; see
28 *Chovan*, 735 F.3d at 1137; *N.R.A.*, 700 F.3d at 194; *Ezell v. City of Chicago*, 651

1 F.3d 684, 702-03 (7th Cir. 2011).

2 If a law burdens conduct that falls outside of the Second Amendment's scope,
3 then the analysis ends and there is no violation. See *N.R.A.*, 700 F.3d at 195; *Ezell*,
4 651 F.3d at 703.

5 As to the second step, rational basis review is not to be used. *Heller*, 554 U.S.
6 at 628 n.27; *Chovan*, 735 F.3d at 1137. Instead, if a law burdens a right within the
7 scope of the Second Amendment, either intermediate or strict scrutiny will be
8 applied. See *Chovan*, 735 F.3d at 1138; *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d
9 at 682. Whether intermediate or strict scrutiny applies depends on: (1) how close
10 the law comes to the core of the Second Amendment right, and (2) the severity of
11 the law's burden on the right. *Chovan*, 735 F.3d at 1138; *N.R.A.*, 700 F.3d at 195;
12 *Ezell*, 651 F.3d at 703. A regulation that threatens a core Second Amendment right
13 is subject to strict scrutiny, while a less severe regulation that does not encroach on
14 a core Second Amendment right is subject to intermediate scrutiny. See *N.R.A.*,
15 700 F.3d at 195; *Chester*, 628 F.3d at 682. The "intermediate scrutiny" standard
16 requires: (1) that the government's stated objective must be significant, substantial,
17 or important, and (2) that there is a reasonable fit between the challenged
18 regulation and the government's asserted objective. *Chovan*, 735 F.3d at 1139-41;
19 *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 683.

20 For there to be a "reasonable fit," the regulation must not be substantially
21 broader than necessary to achieve the government's interest. See *Reed v. Town of*
22 *Gilbert*, 707 F.3d 1057, 1074 n.16 (9th Cir. 2013); *Fantasyland Video, Inc. v. County*
23 *of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007); *United States v. Marzzarella*, 614
24 F.3d 85, 98 (3d Cir. 2010). For additional discussion of how a regulation of First
25 Amendment conduct can be overbroad by the unreasonable inclusion and exclusion
26 of persons the regulation is meant to protect/regulate. See *Berger v. City of Seattle*,
27 569 F.3d 1029 (9th Cir. 2009 en banc).

28

1 A. Plaintiffs Have Satisfied the *Ezell/Chovan/Peruta* est.
2 The WPL Violates Their Second Amendment Rights.

3 The emerging analysis of Second Amendment claims is that they should
4 mirror how First Amendment claims are adjudicated, *Ezell v. City of Chicago*, 651
5 F.3d 684 (7th Cir. 2011); *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) and *Peruta*
6 *v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

7 Step #1 of the *Ezell/Chovan/Peruta* two-part test focuses on whether a 10-
8 Day Waiting Period burdens the Second Amendment. That Step #1 inquiry is
9 primarily a legal one and has already been performed by this Court in its Order
10 Denying the Defendants' Motion for Summary Judgment (Doc #44):

11 The first step is a historical inquiry that seeks to determine
12 whether the conduct at issue was understood to be within the scope of
13 the right to keep and bear arms at the time of ratification. *Chester*, 628
14 F.3d at 680; see *Chovan*, 2013 U.S. App. LEXIS at *23-*25; *N.R.A.*, 700
15 F.3d at 194; *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir.
2011). If a law burdens conduct that falls outside of the Second
16 Amendment's scope, then the analysis ends and there is no violation.
17 See *N.R.A.*, 700 F.3d at 195; *Ezell*, 651 F.3d at 703.

18 Order on Defendant's Motion
19 For Summary Judgment
20 (Doc #44, pg. 6, lines 22-28)

21 Under the *Chovan* framework, the first step is to determine
22 whether the challenged law burdens a right protected under the
23 Second Amendment. The WPL prohibits every person who purchases a
24 firearm from taking possession of that firearm for a minimum of 10
25 days. That is, there is a period of at least 10 days in which California
26 prohibits every person from exercising the right to keep and bear a
27 firearm. There can be no question that actual possession of a firearm is
28 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

1 persons convicted of domestic violence misdemeanors."). Although
2 Harris argues that the WPL is a minor burden on the Second
3 Amendment, Plaintiffs are correct that this is a tacit acknowledgment
4 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.

5 Order on Defendant's Motion
6 For Summary Judgment
7 (Doc #44, pg. 7:22 - 8:7)

8 The "Law of the Case" doctrine ordinarily prohibits a trial court from
9 revisiting a decision made by a higher court, however Ninth Circuit law also
10 cautions a trial court against reconsidering its own prior decisions. See *United*
11 *States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (stating that "reconsideration of
12 legal questions previously decided should be avoided").

13 The Ninth Circuit has also said that "[u]nder the 'law of the case' doctrine, a
14 court is ordinarily precluded from reexamining an issue previously decided by the
15 same court, or a higher court, in the same case." *United States v. Smith*, 389 F.3d
16 944, 948 (9th Cir. 2004) (citing *Richardson v. United States*, 841 F.2d 993, 996 (9th
17 Cir. 1988)) (emphasis added). "Issues that a district court determines during
18 pretrial motions become law of the case." *United States v. Phillips*, 367 F.3d 846,
19 856 (9th Cir. 2004). "The doctrine is a judicial invention designed to aid in the
20 efficient operation of court affairs, and is founded upon the sound public policy that
21 litigation must come to an end." *Smith*, 389 F.3d at 948 (citations and quotation
22 marks omitted). At the same time, the "law of the case" doctrine is "not an
23 inexorable command," *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988)
24 (citation omitted), and is "discretionary." *United States v. Lummi Indian Tribe*, 235
25 F.3d 443, 452 (9th Cir. 2000).

26 Because there was no evidence produced by the Defendants during that trial
27 that waiting periods for firearm purchases were common in 1791 and 1868, *Ezell v.*
28 *City of Chicago*, 651 F.3d 684, 703 (2011), and because this is a bench trial wherein

1 the Defendants have waived their right to have facts determined by a jury, this
2 Court should exercise its discretion, apply the “law of the case” doctrine and decline
3 to revisit this issue.

4 But even if the Court is inclined to give the Defendants a “second bite at the
5 apple” – the record is still bereft of any evidence that WPLs were historically under
6 stood as a longstanding regulation of the rights secured under the Second
7 Amendment.

8
9 B. Defendants Cannot Even Satisfy Intermediate Scrutiny that
10 the 10-Day Waiting Period as Applied Against Plaintiffs Meets the
11 Ezell/Chovan/Peruta Test for Second Amendment Rights.

12 The Defendants have previously argued that neither *Chovan* nor *Peruta*
13 expressly states which party has the burden in a Second Amendment case. They
14 are wrong.

15 “We hold that the government has thereby **met its burden** to show that §
16 922(g)(9)'s prohibition on gun possession by domestic violence misdemeanants is
17 substantially related to the important government interest of preventing domestic
18 gun violence. Because § 922(g)(9) is supported by an important government interest
19 and substantially related to that interest, the statute passes constitutional muster
20 under intermediate scrutiny.” *Chovan* at 1141. (emphasis added)

21 The *Peruta* case (decided after this Court’s summary judgment order) even
22 calls into question the legitimacy of using intermediate scrutiny because that:

- 23 (1) “[A]nalysis [] is near-identical to the free-standing “interest-balancing
24 inquiry” that Justice Breyer proposed – and that the majority
25 explicitly rejected – in *Heller*. See *Heller*, 554 U.S. at 689-90 (Breyer,
26 J., dissenting)(proposing that in the Second Amendment cases the
27 court should “ask[] whether the statute burdens a protected interest in
28 a way or to an extent that is out of proportion to the statute's salutary
effects upon other important governmental interests”); see also *id.* at
634-35 (majority opinion) (rejecting a “judge-empowering
‘interest-balancing inquiry’” as a test for the constitutionality of

1 Second Amendment regulations because "no other enumerated
2 constitutional right [had its] core protection . . . subjected to [such] a
3 freestanding" inquiry)." *Peruta* at 1176.

4 And secondly because of a:

- 5 (2) [D]isagreement with our sister circuits' application of intermediate
6 scrutiny relates to the high degree of deference they afforded the state
7 legislatures' assessments of the fit between the challenged regulations
8 and the asserted government interest they served. *Peruta* at 1177.

9 Furthermore, and while still critical of the balancing test implied by
10 intermediate scrutiny, the *Peruta* Court's criticism of that method was borne out
11 further by its finding that: "In light of the states' failure to demonstrate
12 sufficient narrow tailoring in *Drake*, *Wollard*, and *Kachalsky*, the gun
13 regulations at issue in those cases should have been struck down even under
14 intermediate scrutiny." *Peruta*, at 1178. (emphasis added)

15 This Court's Denial of Defendant's Motion for Summary Judgment adopted
16 the approach that should guide its decision after trial: If the WPL can't even meet
17 intermediate scrutiny, then it is not necessary for this Court to decide on standard
18 of review.

19 C. The 10-Day Waiting Period Cannot Satisfy Intermediate Scrutiny

20 Imposing a 10-day waiting period on a California gun buyer who already: (1)
21 own guns, and/or (2) has a license to carry a firearm, and/or (3) has obtained a
22 Certificate of Eligibility, infringes the rights of the law-abiding, while doing nothing
23 to address the policy objective (longstanding or otherwise) of keeping guns out of the
24 hands of: (1) felons, (2) violent misdemeanants, (3) persons with mental-health
25 disqualifications, (4) persons subject to restraining orders, and (5) probationers.

26 Said another way, the State of California has at least three processes to
27 address prohibited persons who may not lawfully acquire/own/possess firearms:

- 28 (1) The Courts: The criminal justice system, the civil justice system and
the civil mental health system must advise people who become
prohibited that they cannot acquire/own/possess firearms. For each of

1 the five categories that Defendants cite as persons who might become
2 prohibited from acquiring/owning/possessing firearms, that individual
3 gun owner must:

4 a.) be charged with a crime, adjudicated and sentenced to
5 become a felon, violent misdemeanor or probationer and given
6 notice of the firearm prohibition. Penal Code §§ 29810, 29815.

7 b.) be served with notice and given an opportunity to be heard if
8 they are to be subject to restraining orders. Penal Code § 29825.

9 c.) be provided with notice and an opportunity to be heard if the
10 their guns rights are revoked due to a mental health hold.

11 Welfare & Institutions Code §§ 5150, 8100, 8101, 8102, 8103.

12 (2) The \$24 Million “Armed and Prohibited Persons Program” APPS
13 (Penal Code §§ 30000-30015), which actively seeks out, and confiscates
14 weapons and prosecutes gun owners whose firearms have been
15 registered in a computerized and networked database operated by
16 California since 1996 and possibly as far back as 1991. See the
17 testimony of Agent Graham. [TX 333:22 – 447:14]

18 (3) The background check system (not challenged in this case) and the 10-
19 day waiting period. (subject of this lawsuit)

20 Requiring a 10-day waiting period before a dealer can release a firearm to a
21 first time purchaser, who does not presently own/possess a firearm is probably an
22 appropriate condition on the commercial sale of firearms. It’s rationale lies in the
23 fact that this new gun purchaser is a stranger to the state’s database, and the
24 additional cautionary policy of a “cooling off period” to prevent a new gun buyer
25 from committing an impulsive, violent act. That policy is not challenged in this
26 lawsuit.

27 Background checks *per se* are not challenged in this lawsuit. In fact peace
28 officers, normally exempt from the 10-day waiting period are still subject to a

1 background check when purchasing a firearm under California law. [TX Lindley
2 501:17-19]

3 Plaintiffs' case is that these rationales are overbroad when applied to
4 Plaintiffs (and those similarly situated) who (1) already have guns, (2) have a
5 license to carry a firearm at all times issued by their local police chief or sheriff, or
6 (3) have obtained a Certificate of Eligibility to own/acquire/possess guns issued by
7 the Attorney Generals Office.

8 The testimony at trial, and any rational inferences that can be drawn from
9 them, point to an inescapable conclusion that the 10-day WPL is overbroad as
10 applied to Plaintiffs. The most compelling testimony was taken from both the
11 Assistant Chief [TX Buford 244:5-12] and the Bureau Chief of the California
12 Department of Justice. Stephen Lindley's testimony starting at 508:9 bears
13 repeating:

14 Q. Why not simply release firearms upon approval?

15 A. Because we have the 10-day waiting period as a cooling-off period as
16 well.

17 Q. All right, so the only thing that's stopping you from releasing a
18 firearm upon approval of the background check is the statute, and the
19 statute is based upon we still want a cooling-off period.

20 A. Once the background is approved?

21 Q. Yes.

22 A. Yes.

23 Finally, the safety nets of the APPS system and the "rap-back" system for
24 insuring that the California Department of Justice learns of a subsequently
25 disqualified gun-owner or COE or CCW holder, supports the conclusion that the 10-
26 day waiting period for persons like the Plaintiffs is overbroad when there is
27 another, independent system that can directly address the government interest
28 without infringing rights.

////

1 D. Plaintiffs' Fourteenth Amendment Claims Are Viable and
2 Actually Suggest the Remedy Required

3 The Plaintiffs' Equal Protection claim is predicated on the allegation that a
4 state actor is engaged in unequal treatment of similarly situated persons exercising
5 a fundamental right (i.e., the Second Amendment) and that this requires the
6 application of strict scrutiny to the government's policy. *Police Department of*
7 *Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

8 That Equal Protection claim is based on the irrational and under-inclusive
9 categories of (18) exceptions to the 10-day waiting period that are not even tethered
10 to the justifications advanced by the Defendants for applying this policy against
11 Plaintiffs and those other gun owners are similarly situated.

12 California's Supreme Court issued an opinion rejecting an Equal Protection
13 claim challenging California's Assault Weapons Control Act by applying a mere
14 rational basis test. That Court rejected the idea that the right of self-defense was a
15 fundamental right. From *Kasler v. Lockyer* 23 Cal. 4th 472 (2000):

16 This fundamental right plaintiffs locate in article I,
17 section 1 of the California Constitution, which provides:
18 "All people are by nature free and independent and have
19 inalienable rights. Among these are enjoying and
20 defending life and liberty, acquiring, possessing, and
21 protecting property, and pursuing and obtaining safety,
22 happiness, and privacy." If plaintiffs are implying that a
23 right to bear arms is one of the rights recognized in the
24 California Constitution's declaration of rights, they are
25 simply wrong. No mention is made in it of a right to bear
26 arms. (See *In re Rameriz* (1924) 193 Cal. 633, 651 [226 P.
27 914, 34 A.L.R. 51] ["The constitution of this state contains
28 no provision on the subject"].

29 The opinion went on find that "[A]s the AWCA does not burden a
30 fundamental right under either the federal or the state Constitutions, the rational
31 basis test applies." *Id.*, at 481.

32 *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of*
33 *Chicago*, 130 S. Ct. 3020 (2010) rendered *Kasler* and the reasoning underlying that

1 opinion obsolete. The “right to keep and bear arms” is a fundamental right and
2 Equal Protection challenges to state gun control laws that purport to infringe that
3 fundamental right must be subject heightened scrutiny.

4 It is worth noting that even with an erroneous conclusion about the status of
5 the Second Amendment, the Ninth Circuit found no rational basis for treating gun
6 owners who used to be police officers (e.g., retired) differently from non-police
7 officers when it came to California’s Weapons Control laws. *See generally Silveira*
8 *v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *reh’g denied* 328 F.3d 567 (9th Cir. 2003).

9 Furthermore the testimony at trial strongly implied that the exception to the
10 10-day waiting period for persons with a Curio and Relic license, but only when
11 purchasing curio and relic firearms (Penal Code § 26970), is not even rational on its
12 face since many popular modern firearms that are sold today meet the definition of
13 curio and relic. [TX Graham 380:19-382:6]

14 While Plaintiffs aver that their Second Amendment claim is strong enough
15 for this Court to find for them without reaching the Fourteenth Amendment issues,
16 in the same way that the Ninth Circuit dealt with Plaintiff/Appellants’ additional
17 claims in *Peruta v. County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014) at
18 footnote 22. (“Because we reverse on the basis of the Second Amendment issue, we
19 do not reach any of Peruta’s other claims.”), the Fourteenth Amendment claim does
20 suggest the remedy this court may want to consider.

21 From a practical point of view, this court can either:

- 22 A. Issue an injunction that Californians who: (1) already have guns, (2)
23 have a license to carry a firearm at all times issued by their local police
24 chief or sheriff, or (3) have obtained a Certificate of Eligibility to
25 own/acquire/possess guns issued by the Attorney Generals Office, are
26 not subject to the 10-Day Waiting Period, effectively expanding the list
27 of exceptions from 18 to 21. – or –
28 B. Issue an injunction that will invalidate the 10-Day Waiting Period for

1 all Californians. Stay that decision for six months to give the
2 California Legislature time to fashion a legislatively based remedy.
3 *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

4 What is not disputed is that the state's rationale for treating some gun-
5 buyers different from other gun-buyers can withstand the strict scrutiny analysis
6 required of the 14th Amendment when the fundamental rights protected are
7 guaranteed by the Second Amendment.

8

9

CONCLUSION

10 The 10-Day Waiting Period is not a narrowly tailored remedy to address
11 impulsive violence when a person already owns a guns, nor is it necessary to
12 conduct background checks for persons already armed and trustworthy.

13 What all this means is that the State of California must either: (A) concede
14 that the current regime of requiring the registration of firearms and their owners
15 since 1991 is an abject failure and that registration schemes and computer
16 databases are unreliable (i.e., that's why they need 10 (or more) days); or (B)
17 concede that the DROS/Background check, Rap-Back and Armed Prohibited
18 Persons System makes the 10-Day Waiting Periods redundant for current gun
19 owners who are already in the system. They can't have it both ways.

20 Respectfully Submitted on June 16, 2014 by:

21 /s/ Victor Otten
Victor J. Otten (SBN 165800)

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23

24 /s/ Donald Kilmer
Donald E. J. Kilmer, Jr. (SBN 19986)

25 Attorneys for Plaintiffs

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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 16, 2014, I electronically filed and, therefore, to the best of my understanding, caused to be electronically served through the Court’s ECF system:

1. Plaintiffs’ Findings and Order After Bench Trial
2. Plaintiffs’ Motion to Exclude Evidence Not Already Admitted or Withdrawn Contained in Defendant’s Request for Judicial Notice.
3. Plaintiffs’ Memorandum of Points and Authorities in Support of (Proposed) Findings of Fact and Conclusions of Law After Bench Trial.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2014, at San Jose, California.

/s/ Donald Kilmer
Attorney for Plaintiffs.