No. 14-16840

In the United States Court of Appeals for the Ninth Circuit

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

v.

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

On Appeal from the United States District Court
for the Eastern District of California

Case No. 1:11-cv-02137-AWI-SKO
(The Honorable Anthony W. Ishii, Senior District Judge)

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLANT AND REVERSAL

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April 1, 2015

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Everytown for Gun Safety has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

/s/ Deepak Gupta
Deepak Gupta

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Everytown for Gun Safety is the largest gun-violence-prevention organization in the country. It has more than 2.5 million supporters—everyday Americans, moms, survivors of gun violence, and more than 1,000 current and former mayors from across the nation, including the current mayors of more than 50 California cities. They are united in their understanding that respect for the Second Amendment can go hand-in-hand with common-sense gun laws.[1]

Everytown files this brief because the district court's decision threatens that understanding. Its reasoning, if upheld, would imperil a broad range of 20th-century gun laws deemed "presumptively lawful" in *District of Columbia v. Heller*—including federal "prohibitions on the possession of firearms by felons and the mentally ill" and laws "imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 & n.26 (2008). This brief highlights the flaws in the court's cramped historical analysis and its overzealous application of Second Amendment scrutiny. In particular, the brief provides this Court with a fuller history of California's waiting-period law, the model legislation from which it emerged, and the broad national consensus that developed around it in the years following its passage—a history that was overlooked by the district court.

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[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the preparation and submission of the brief.

For nearly a century, California has required gun buyers to wait a short period of time before receiving their firearms. Although the period has varied—from one day (in 1923) to fifteen days (in 1975) to ten days today—its purpose has remained the same: to give law enforcement enough time to determine whether the buyer falls into a category prohibited from owning a gun (such as felons or the mentally ill), while creating a brief cooling-off period to reduce impulsive violence. California's waiting period originated in legislation containing one of the nation's earliest felon prohibitions—legislation written by the National Rifle Association's leaders and promoted by the NRA as model legislation for the states to enact, many of which did just that. As governor, Ronald Reagan extended the waiting period, and later, as president, cited its success in urging a national analogue. Today, fifteen states and the District of Columbia either have waiting periods or require permits to purchase that can take 10 days—or more—to issue.

Dismissing this consensus and tradition, the district court struck down California's waiting period as applied to those who (a) already possess a firearm, concealed-carry permit, or certificate of eligibility, and (b) pass the State's background check before the waiting period elapses. EOR 2. In reaching that conclusion—the first of its kind from any court—the district court made at least two fundamental errors, both of which independently require reversal.

First, the court misapplied the Supreme Court's decision in *Heller*, which struck down one of the most "severe restriction[s]" in "the history of our Nation" because it "amount[ed] to a destruction" of "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 628-29, 635. *Heller* made clear, however, that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . or laws imposing conditions and qualifications on the commercial sale of arms," which are "presumptively lawful." *Id.* at 626-27 & n.26.

California's law is a century-old commercial sales regulation that facilitates the prohibitions on felons and the mentally ill, but the district court refused to recognize it as "presumptively lawful." Instead, the court characterized it as neither "longstanding" (because "no statutes or regulations around 1791 or 1868" created waiting periods) nor a condition "on the commercial sale of arms" (because there are "no comparable commercial laws that apply to other goods"). EOR 42-44.

But gun laws "need not mirror limits that were on the books in 1791" or 1868 to qualify as presumptively lawful. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). To the contrary, the laws *Heller* itself identifies as "longstanding" and presumptively lawful are of the same "20th Century vintage" as California's law. *Id.* This Court recently made clear that *Heller* erases any doubt that "early twentieth century regulations" like California's law may "demonstrate a

history of longstanding regulation" even if they lack a "precise founding-era analogue." *Fyock v. Sunnyvale*, — F.3d —, 2015 WL 897747, *4 (9th Cir. Mar. 4, 2015). Because the challenged law imposes a condition on firearm sales to enforce categorical prohibitions originating in the very same statute, it is just as "longstanding" and "presumptively lawful" as those prohibitions.

Nor can the plaintiffs rebut that presumption. They already own firearms. Waiting a week to add another gun to their arsenals is a de minimis burden, at best. The Constitution speaks of a "right to keep and bear arms"—not a guarantee of the ability to instantaneously stockpile an unlimited cache of lethal weapons.

Second, even assuming some Second Amendment scrutiny were appropriate, the district court erred by insisting, in effect, on the least restrictive means. "[I]ntermediate scrutiny does not require the least restrictive means of furthering a given end," but only that the law be "substantially related" to that end—a hurdle this law easily clears. *Jackson v. San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014). Nor does the law burden the right "substantially more" than necessary. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 185 (1997). As an NRA official observed when the group backed a seven-day waiting period, such laws have "not proved to be an undue burden on the shooter and sportsman." Webber, *Where the NRA Stands on Gun Legislation*, The American Rifleman, at 22 (Mar. 1968).

STATEMENT

1. ***California adopts its waiting period alongside one of the earliest prohibitions on firearm possession by felons.*** California first enacted its waiting-period law almost a hundred years ago, in 1923, as part of a broader effort to regulate firearms in this country. At the time, "more than 9,500 unlawful homicides" occurred every year in the U.S., 90% of which were committed with firearms—"worse than that in any other civilized country." Report of the Special Commission on Law Enforcement, *in* Swaney, *What Shall we do to Stop Crime?*, N.Y. Times Current History, Sept. 1922, at 924.

California's law did two things relevant to this case: First, it prohibited convicted felons from owning or possessing a firearm and imposed a corresponding restriction on selling them a gun. Law of June 13, 1923, ch. 339, §§ 2, 10, 1923 Cal. Laws 695, 696. Second, it required a one-day waiting period before consummating the sale of any firearm, and prescribed instructions for delivery of the firearm after the waiting period ended. *Id.* § 10. This second provision facilitated the first, and the legislature put the waiting-period requirement right next to the ban on sales to felons, in the first two sentences of the same section. *Id.*

2. ***California's law is part of a national trend, modeled on legislation drafted by the NRA's leaders.*** California was not the only state to enact these provisions during this time. Earlier that same year, North Dakota

prohibited sales to felons and created a one-day waiting period, while making the link between the two even more pronounced: North Dakota placed the requirements in the same sentence, under a section entitled "Sales Regulated." Law of Mar. 7, 1923, ch. 266, § 10, 1923 N.D. Laws 379, 381. A few months later, Connecticut imposed a one-day waiting period on all handgun sales. Law of June 2, 1923, ch. 252, § 7, 1923 Conn. Laws 3707, 3708. And in 1925, two more states—Oregon and Indiana—enacted one-day waiting periods and banned sales to felons in nearly identical provisions. *See* Law of Feb. 26, 1925, ch. 260, § 10, 1925 Or. Laws 468, 473; Law of Mar. 12, 1925, ch. 207, § 9, 1925 Ind. Laws 495, 497.[2]

That these laws were nearly identical was no coincidence: they were all proposed and advocated by the U.S. Revolver Association, a "non-commercial organization of amateur experts in the use of revolvers," which had spent several years urging states to adopt uniform firearm legislation to combat the growing wave of violence (and as an alternative to stricter laws like New York's Sullivan Act, which required a permit to possess a firearm). Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767 (1926). The NRA's president, Karl T. Frederick, was "one of

[2] Another state, New Jersey, enacted a 24-hour waiting period that same year. Law of Mar. 12, 1925, ch. 64, § 4, 1925 N.J. Laws 185, 188. Two years later, New Jersey extended its waiting period to seven days. Law of Mar. 30, 1927, ch. 321, § 6(4)(b), 1927 N.J. Laws 742, 745.

the draftsmen." *3rd Report of Comm. on Uniform Act to Regulate the Sale & Possession of Firearms*, Nat'l Conf. on Uniform State Laws 573 (1926) (*1926 Conference Report*).

California's law "follow[ed] the Revolver Association Act very closely," and North Dakota and Indiana adopted it "practically verbatim." Imlay, *Uniform Firearms Act*, 12 A.B.A. J. at 767. As Mr. Frederick explained in his testimony to Congress in 1934, the law that "was first drafted by me about 14 years ago . . . has been the law in California for many years." *National Firearms Act: Hearings Before the Comm. on Ways & Means*, 73d Cong. 38, 39 (1934).

3. *Uniform legislation is developed, as more states enact waiting periods.* Around the time that California enacted its waiting-period law, the National Conference of Commissioners on Uniform State Laws took up firearms legislation. In 1926, the Conference selected the Revolver Association Act "as the model of the draft of the Uniform Act," because it had "already gained ground" in the states. *Report of Comm. on Act to Regulate the Sale & Possession of Firearms*, Nat'l Conf. on Uniform State Laws 569 (1930) (*1930 Conference Report*). The Conference expressed its belief that "the provisions of the proposed law present no constitutional obstacles" and "constitute no radical changes in existing laws." *1926 Conference Report* at 574. The Conference explained that the waiting period was "intended to avoid the sale of a firearm to a person in a fit of passion." *Id.* at 582-83.

Four years later, in 1930, the Conference revised the law slightly, and the ABA again approved. *Id.* at 568. This law extended the waiting period to 48 hours and the sales prohibition to "drug addict[s]," "habitual drunkard[s]," and those of "unsound mind." *Id.* at 565. In doing so, the act "adopt[ed] the principle of a strict regulation of the sale and purchase of pistols" to keep "weapons out of the hand of criminals and other prohibited classes," while also subscribing to "the theory that the securing of a pistol by a householder as a legitimate means of defense should not be made difficult." *Id.* at 570. The NRA's Frederick was a "special consultant" to the Conference, and helped "frame" the 1930 law. Webber, *Where the NRA Stands*, at 22; *see also 1926 Conference Report* at 573 (noting that Frederick likewise "considered with the chairman all the points covered" in the 1926 version).

To the Conference, the uniform firearms act "embodie[d] sane forms of regulation which have stood the test of experience in this country," yet also reflected some of the "new ideas [that] ha[d] been presented from time to time. Thus, at the same time that it preserves the traditional methods of firearms regulation, it takes advantage of enlightened experience of recent years." *1930 Conference Report* at 532. Over the next few years, four additional states passed laws with 48-hour waiting periods and violent-criminal prohibitions: Pennsylvania, South Dakota, Washington, and Alabama. *See* Law of June 11, 1931, No. 158, §§ 4, 9, 1931 Pa. Laws 497, 498-99; Law of Mar. 14, 1935, ch. 208, §§ 4, 8, 9, 1935 S.D.

Laws 355, 356; Law of Mar. 23, 1935, ch. 172, §§ 4, 8, 9, 1935 Wash. Laws 599, 601; Law of Apr. 6, 1936, No. 82, §§ 4, 8, 9, 1936 Ala. Laws 51, 52.[3]

4. *Congress enacts a waiting period for Washington, DC.* In 1932, Congress enacted a nearly identical version of the uniform act for the District of Columbia, including the 48-hour waiting period and violent-criminal prohibition. Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 652. The legislation's sponsor, Senator Arthur Capper (R-KS), remarked on the Senate floor that the law had "the very strong approval of the police department of the District of Columbia, of the District Commissioners, and of the civic organizations." 75 Cong. Rec. 12754 (June 13, 1932). And although the waiting period required that a firearm "sale would not be consummated until 48 hours after the application was made," he explained, "[t]he right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill." *Id.*[4]

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[3] Hawaii enacted a one-day waiting period and a violent-criminal prohibition in 1927. Law of Apr. 27, 1927, Act 206, §§ 4, 9, 1927 Haw. Laws 209, 211. On the same day, Massachusetts enacted a one-day waiting period, while providing that felons could not receive a license to carry. Law of Apr. 27, 1927, ch. 326, §§ 2, 3, 1927 Mass. Laws 413, 414.

[4] Congress didn't enact "[t]he first federal statute disqualifying felons from possessing firearms" until 1938, and it "covered only a few violent offenses." *Skoien*, 614 F.3d at 640 (citing Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1251). It wasn't until the 1960s that Congress extended the ban to all felons. *Id.* (citing 18 U.S.C. § 922(g)(1)).

5. *The NRA urges enactment of legislation with a waiting period.* Later that same year, the NRA held its annual meeting in New York City, during which the "main order of business" was to urge the State of New York to replace the Sullivan Act with the less strict uniform act, under which "the applicant for pistol files an application with a firearms dealer and forty-eight hours later receives the pistol for home use, providing the police investigation that has been made in the meantime shows him to have a clean record as an upright citizen." *Sportsmen Fight Sullivan Law*, 23 J. Crim. L. & Criminology 665, 665 (1932). Although New York's legislature had passed the act earlier that year, Governor Franklin Roosevelt vetoed it; in his view, the uniform act did not go far enough to regulate firearms. *The Uniform Firearms Act*, 18 Va. L. Rev. 904, 904 & n.1 (1932).

6. *As broad consensus develops, California's waiting period is extended.* Over time, California extended its waiting period to three days (in 1956) and then five days (in 1965) to ensure that law enforcement had enough time to "investigate the purchaser's record, before he actually acquires the firearm, to determine whether he falls within the class of persons prohibited from possessing concealed firearms." EOR 18, 243; *see also* EOR 250 (letter from assemblyman explaining that law enforcement "fe[lt] that the three day waiting period [was] not enough, in all cases, for them to run an adequate record check of the person seeking to purchase a concealable weapon"); *People v. Bickston*, 91 Cal. App. 3d 29,

32 (Ct. App. 1979) (citing "legislative hearing records" showing that California's "Department of Justice needed more time to identify prospective purchasers," while the law also sought "to cool people off" and reduce impulsive violence).

These extensions were not controversial. By this point, even the NRA supported federal legislation that would have "requir[ed] an additional 7-day waiting period by the seller after receipt of acknowledgement of notification to local police." Webber, *Where the NRA Stands*, at 23; *see also* Winkler, *Gunfight* 70 (2011) ("In the 1960s, the NRA endorsed a . . . seven-day waiting period to enable background checks on handgun purchasers."). An NRA pamphlet from the 1970s also noted that a "waiting period could help in reducing crimes of passion in preventing people with criminal records or dangerous mental illness from acquiring guns." *Id.* And NRA Secretary Frank C. Daniel recognized that waiting-period laws have "not proved to be an undue burden on the shooter and sportsman," and "adequately protect[] citizens of good character." Webber, *Where the NRA Stands*, at 23.

7. Governor Ronald Reagan signs into law a 15-day waiting period for California and later, as president, touts its lifesaving success in urging a federal analogue. California Governor Ronald Reagan shared this view. In 1975, he "supported and signed into law" a 15-day waiting period for California. Ronald Reagan, *Why I'm for the Brady Bill*, N.Y. Times, Mar. 29, 1991,

available at http://nyti.ms/1ktoY3u. In his view, the five-day waiting period did not give law enforcement enough time "to thoroughly check all records of the purchasers" before delivery. EOR 19.

Sixteen years later, when President Reagan announced his support for "a national seven-day waiting period"—which he believed was needed to provide an "enforcement mechanism" for the federal prohibition on sales to "felons, fugitives, drug addicts[,] and the mentally ill"—he emphasized that California's 15-day waiting period had "stopped nearly 1,800 prohibited handgun sales in 1989" alone. Reagan, *Why I'm for the Brady Bill*. Moreover, President Reagan explained, "since many handguns are acquired in the heat of passion (to settle a quarrel, for example) or at times of depression brought on by potential suicide," requiring a purchaser to wait a week or two before receiving the firearm provides "a cooling-off period" that has "the effect of reducing the number of handgun deaths." *Id.*[5]

California has since reduced its waiting period to ten days, because the Bureau of Firearms can conduct background checks more quickly using an electronic database. *See* Cal. Penal Code §§ 26815(a) & 27540(a).

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[5] In 1993, Congress enacted the Brady Act, which among other things required a gun dealer to "wait five business days before consummating [a] sale." *Printz v. United States*, 521 U.S. 898, 903 (1997) (citing 18 U.S.C. § 922(s)(1)(A)(ii)). This five-day waiting period (apparently unconstitutional by the district court's lights) lapsed in 1998.

ARGUMENT

This Court follows a two-step inquiry to determine the constitutionality of a gun law: (1) Does the law burden protected Second Amendment conduct? (2) And, if so, does it satisfy the appropriate level of scrutiny? *Jackson*, 746 F.3d at 960. The district court erred at both steps. California's waiting period qualifies as one of the "presumptively lawful regulatory measures" identified by the Supreme Court in *Heller*, 554 U.S. at 626-27 & n.26, and imposes no more than a de minimis burden on protected conduct—at least as applied to those who already own a firearm. That should end the inquiry. But even if it didn't, the law would easily survive intermediate scrutiny because the ten-day waiting period is reasonably aimed at reducing impulsive acts of violence by providing a short cooling-off period, and allowing law enforcement enough time to conduct a background check and investigate straw purchases.

I. California's ten-day waiting period is a presumptively lawful regulation, and the district court's contrary conclusion resulted from an erroneously cramped historical analysis.

Heller held that several types of laws—including "prohibitions on the possession of firearms by felons and the mentally ill" and "laws imposing conditions and qualifications on the commercial sale of arms"—are presumed not to violate the Second Amendment because of their longstanding acceptance as consistent with its protections. 554 U.S. at 626-27 & n.26. Thus, "[t]o determine whether a

challenged law falls outside the historical scope of the Second Amendment, [this Court] ask[s] whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*." *Jackson*, 746 F.3d at 960; *see also Fyock*, 2015 WL 897747, *4 (explaining that *Heller*'s "longstanding prohibitions . . . fall outside of the Second Amendment's scope"); *United States v. Vongxay*, 594 F.3d 1111, 1115, 1117 (9th Cir. 2009). California's waiting period is as longstanding (and thus as presumptively lawful) as the regulations *Heller* identified. Indeed, it was adopted in the same section of the same statute that enacted California's first felon prohibition.

Yet the district court held that the law—despite being on the books for nearly a century—is not a "longstanding regulatory measure" and doesn't impose a "condition [or] qualification on the commercial sale of a firearm." EOR 42. That is doubly wrong: The law is "longstanding" under *Heller* and this Court's case law. And it clearly imposes a condition on commercial sales—a condition designed to facilitate equally longstanding laws prohibiting possession by felons and the mentally ill. It is therefore presumptively constitutional, and the plaintiffs cannot overcome the presumption here.

A. California's waiting-period law is "longstanding."

The district court reasoned that the law is not "longstanding" because there are "no statutes or regulations around 1791 or 1868 that imposed waiting periods between the time of purchase and the time of delivery." EOR 42-44. But as Judge

Easterbrook has explained, gun laws "need not mirror limits that were on the books in 1791" (or for that matter, 1868) to qualify as longstanding under *Heller*. *Skoien*, 614 F.3d at 641; *see also United States v. Bena*, 664 F.3d 1180, 1182 (8th Cir. 2011) (same); *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) ("[T]he legislative role did not end in 1791."). This Court recently held the same. Just last month, it made clear that "early twentieth century regulations"—like the one at issue here—may "demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 2015 WL 897747, at *4.

Any other rule would conflict with *Heller*, which deemed certain laws "longstanding" even though they lacked a "precise founding-era analogue." *Id.* (internal quotation marks omitted). The first felon prohibitions in state law, for example, arose in the early 20th century (in the same laws creating the first waiting periods). *See, e.g.*, 1923 Cal. Laws 695, 696, 701, §§ 2, 10; 1923 N.D. Laws 379, 380-81, §§ 5, 10. And "[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938," while "the ban on possession by *all* felons was not enacted until 1961." *Skoien*, 614 at 640; *see also Booker*, 644 F.3d at 23-24 ("[T]he modern federal felony firearm disqualification law . . . is firmly rooted in the twentieth century and likely bears little resemblance to laws in effect at the time the Second Amendment was ratified."). With few exceptions, "legal limits on the

possession of firearms by the mentally ill also are of 20th Century vintage." *Skoien*, 614 at 641.

As for "laws imposing conditions and qualifications on the commercial sale of arms," *Heller*, 554 U.S. at 626-27, they too are without a Founding- or Reconstruction-Era pedigree. One scholar surveyed the landscape and was "unable to identify any eighteenth-century American laws that specifically regulate commercial aspects of firearms sales." Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1379 (2009). It was not until 1927—four years after California enacted its waiting period—that "federal commercial regulation of firearms began." *Id.*

Yet all these laws are "presumptively constitutional, as *Heller* said in note 26." *Skoien*, 614 F.3d at 640; *see also NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("*Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage."). Thus, "*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *Id.*; *see also* Rosenthal & Winkler, *The Scope of Regulatory Authority under the Second Amendment*, Reducing Gun Violence in America 228 (2013) ("[I]n determining the scope of the Second Amendment right," courts have "conclude[d] that legislatures

are not limited to framing-era regulations" because "the laws characterized as presumptively valid in *Heller* . . . did not exist at the time of ratification.").[6]

So the constitutional question is not, as the district court wrongly thought, whether there were any "waiting period laws in any states during the time periods around 1791 and 1868." EOR 43. Instead, it is whether California's waiting-period law is "longstanding" within the meaning of *Heller*. It is.

California's law was originally enacted in 1923, as part of the first wave of laws creating waiting periods in this country. All told, a dozen states enacted waiting periods in the 1920s and 30s consistent with the Uniform Law Commission's model legislation, and Congress enacted a waiting period for the District of Columbia. There was such consensus about these waiting periods that even the NRA advocated their adoption for the first three-quarters of the 20th century. Many waiting periods, moreover, arose in the same laws containing some of the earliest felon prohibitions—including California's. 1923 Cal. Laws 695, 696, 701, §§ 2, 10. How can one part be longstanding, but not another? Given this "historical prevalence," California's law is a "longstanding" regulation under *Heller*.

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[6] First Amendment doctrine bolsters this conclusion. It has "long had categorical limits" that "are not restricted to those recognized in 1791." *Skoien*, 614 F.3d at 641. Child pornography, for example, is unprotected "even though the materials do not meet the historical definition of obscenity." *Id.* Another example is "speech as part of a public employee's job," held in 2006 to be "categorically outside the First Amendment." *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

Fyock, 2015 WL 897747, at *4; *see also Dearth v. Holder*, 893 F. Supp. 2d 59, 66 (D.D.C. 2012) (Wilkins, J.) (holding that a 1968 federal law was "longstanding" under *Heller* in part because its state-law analogues dated to 1909).

B. California's waiting-period law regulates the "commercial sale of arms."

The district court also determined that "it is not clear to the Court that a 10-day waiting period would qualify as a commercial regulation" because California "cite[d] no comparable commercial laws that apply to other goods and that require an individual to wait around 10-days [*sic*] before completing a purchase." EOR 43. There can be no serious debate, however, that California's waiting-period law "impos[es] conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. It regulates the transfer of a firearm in a *sale*—and thus regulates when the sale is consummated. And it does so to help law enforcement determine whether the buyer may lawfully purchase the gun, which the district court recognized is a form of commercial regulation. EOR 43. That means that the waiting period imposes a condition on the sale of firearms, regardless of whether other laws impose similar conditions on the sale of other products. *See Dearth*, 893 F. Supp. 2d at 66 (holding that federal law prohibiting non-residents from receiving arms from unlicensed dealers "pertain[s] to the transfer or sale of firearms, rather than the mere possession of firearms," and thus "impos[es] conditions and qualifications on the commercial sale of arms"). Lest there be any doubt, the very

section in which the waiting period appears in the 1930 model act is entitled "Sales Regulated." *1930 Conference Report* at 565.

Because California's waiting-period law is a longstanding commercial regulation—and because it has been directly connected, from its inception, with facilitating "longstanding prohibitions on the possession of firearms by felons and the mentally ill"—the law is "presumptively lawful" under *Heller*, 554 U.S. at 626.

C. Any burden imposed by California's law is de minimis.

Even if this Court were to consider, as some courts have, whether the plaintiffs "may rebut this presumption" by establishing that the law has "more than a de minimis effect" on their rights, the plaintiffs could not make that showing here. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011). The Supreme Court in *Heller* held that the core of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. This case is an as-applied challenge to a waiting period brought by people who already own firearms. Any burden imposed by the ten-day wait is thus exceedingly slight: The law does not block the plaintiffs' right to defend themselves in their homes for *any* period of time; instead, it simply delays their ability to supplement their existing arsenals by a little more than a week. Because the United States Constitution contains no guarantee of a right to instantaneously

purchase an unlimited quantity of lethal weapons, any burden imposed on the plaintiffs is de minimis.

Holding otherwise, the district court reasoned that the plaintiffs' ability "to exercise their Second Amendment right with respect to at least one firearm does not mean that they have diminished rights under the Second Amendment." EOR 42 n.33. But the point is not that they have diminished *rights*; it's that the *burden* imposed on their rights is diminished because they already own firearms to defend themselves, so the short period of time they have to wait to acquire additional firearms poses no serious infringement. And any burden is further diminished by the fact that the plaintiffs in this case "do not argue that they should be exempt from a background check[,] nor do they argue that the background check is unconstitutional," but instead complain only that they should not be required to wait the extra time after the background check is completed (often just a day or two because the vast majority of applications require a manual review). EOR 8, 29-30, 45. At least as applied to those who already own firearms, that is at most a de minimis burden.

II. Even if California's waiting-period law were not presumptively lawful, it would easily pass muster under intermediate scrutiny.

A. The district court misapplied intermediate scrutiny.

Erroneously proceeding to step two of the inquiry, the district court purported to "examine the waiting period laws under intermediate scrutiny," EOR

44, a standard that requires a "reasonable fit" between the challenged regulation and an important state interest. *Jackson*, 746 F.3d at 965. The court recognized that "California has important interests in public safety/preventing gun violence and preventing prohibited individuals from obtaining firearms," yet held that the law is not a "reasonable fit" with any of those interests as applied to people who already own firearms and who pass a background check before the waiting period is over. EOR 44-54. Under that holding, California would be required to transfer firearms to those people immediately upon completion of the background check—in other words, to adopt the least restrictive means to achieve the State's public-safety goals.

But "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Jackson*, 746 F.3d at 969. It requires only that the law be "substantially related" to an important state interest, thus allowing governments "a reasonable opportunity to experiment with solutions to admittedly serious problems"—an especially important concern in the Second Amendment context because of the devastating effects of firearm violence. *Id.* at 969-70. Put differently, under intermediate scrutiny, "the State must show a fit that is *reasonable*, not perfect." *Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013) (emphasis added, internal quotation marks omitted). And, to determine whether the fit is reasonable, the law "ha[s] to be evaluated in the context of the entire regulatory scheme." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 192-193 (1999).

The district court, however, focused exclusively on whether the law serves its purposes only as to certain narrow categories of people, while ignoring whether it does so in general. *See* EOR 45. But if intermediate scrutiny is to mean anything—if it truly allows the State leeway in writing legislation to solve pressing societal problems—then courts may not insist on exceptions that would eliminate that leeway under the guise of intermediate scrutiny. To do so is to demand the least restrictive means, and thus to impermissibly bootstrap strict scrutiny into the inquiry.[7]

This Court has recognized as much in the First Amendment context, which "bears strong analogies" to the question here. *Jackson*, 746 F.3d at 960. Challenges to commercial-speech restrictions, for example, have traditionally been subject to intermediate scrutiny. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Those challenges, this Court has repeatedly emphasized, are "*not* focused on the particular plaintiff; instead, the Court must look at" whether the law advances the State's interest "in its *general* application, not specifically with respect

[7] Strict scrutiny is inapplicable. As applied to those with firearms, the law "does not impose the sort of severe burden" that might justify strict scrutiny. *Jackson*, 746 F.3d at 964. And applying strict scrutiny to *Heller*'s "presumptively lawful" categories would render them meaningless; strict scrutiny is "'strict' in theory but usually 'fatal' in fact." *Bernal v. Fainer*, 467 U.S. 216, 219 n.6 (1984); *see* Winkler, *Fatal in Theory & Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 862-63 (2006) (under strict scrutiny, courts strike down about 70% of laws).

to a particular speaker." *Vanguard Outdoor v. City of Los Angeles*, 648 F.3d 737, 743 (9th Cir. 2011) (emphasis added, internal quotation marks omitted). That is because, when assessing whether the law's fit is reasonable, "[i]t is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 (9th Cir. 2009).

Thus, although the district court purported to apply intermediate scrutiny, it erred by failing to "look at whether the [law] advances its interest in its general application, not specifically with respect to [the plaintiffs]." *Id.* When the law is assessed under the proper standard, there can be little doubt that it satisfies intermediate scrutiny.

B. California's law easily satisfies intermediate scrutiny, properly applied.

California has asserted that its waiting-period law serves three important state interests: (1) allowing law enforcement enough time to complete a thorough background check to ensure that the prospective purchaser may lawfully possess the firearm before receiving it; (2) providing a cooling-off period to prevent impulsive acts of violence more easily committed with a firearm; and (3) giving law enforcement the opportunity to investigate straw purchases before they are completed. EOR 45. Although the State need only show a reasonable fit with one

of these important interests, the ten-day waiting period is "substantially related" to all three. *Jackson*, 746 F.3d at 966.

1. *Background Checks*. The district court found that the vast majority of applications to purchase firearms (80%) are not automatically approved, and thus "further review, analysis, and/or investigation is necessary to determine if a person is prohibited from possessing a firearm." EOR 46. This manual review is frequently not completed until the very end of the ten-day period. EOR 30. Because the plaintiffs deny neither that background checks help keep firearms out of the hands of people barred from possessing them nor that this serves an important state interest, the only question is whether California's legislature reasonably concluded that a ten-day period was necessary to facilitate this process.

As detailed in the Attorney General's brief, the State sensibly concluded that ten days were necessary because (a) the manual-review process can take several days or more given that "many records have gaps and/or mistakes," and (b) this process often cannot begin right away because of the extraordinary number of applications received every year. AG Br. 11. California's elected leaders were entitled to draw these "reasonable conclusions." *Jackson*, 746 F.3d at 969.

Intermediate scrutiny does not require the State to put forward proof that its aims are always achieved; the State instead "may rely on any evidence reasonably believed to be relevant" in making policy to achieve important interests. *Id.* But

experience shows that California's waiting period has in fact been effective. As President Reagan noted in announcing his support for "a national seven-day waiting period," California's 15-day waiting period "stopped nearly 1,800 prohibited handgun sales in 1989" alone, by "allow[ing] local law enforcement officials to do background checks for criminal records or known histories of mental disturbances" before the purchaser received the gun. Reagan, *Why I'm for the Brady Bill*.

Without a waiting period, President Reagan stressed, the categorical prohibitions on sales to "felons, fugitives, drug addicts[,] and the mentally ill" have "no enforcement mechanism and basically work[] on the honor system, with the purchaser filling out a statement that the gun dealer sticks in a drawer." *Id.* The waiting period gives teeth to these important prohibitions, and in doing so—as the NRA informed its members in the 1970s—helps prevent "people with criminal records or dangerous mental illness from acquiring guns." Winkler, *Gunfight* 70.

2. *Cooling Off.* The law also reasonably advances California's second asserted interest: providing a cooling-off period to prevent suicides and crimes of passion. There is ample evidence, as the Attorney General points out, "that people who purchase firearms are at a high risk of committing suicide-by-firearm in the first week after purchase." AG Br. 13. By requiring prospective gun buyers to wait ten days, California's legislature "reasonably believed" that it would reduce the

number of avoidable suicides in the State, which in turn would benefit public safety. *Jackson*, 746 F.3d at 969. The importance of that interest cannot be overstated. Firearms account for as many as 57% of all suicides in the United States, and "alternative means of suicide are less likely to be fatal." Romero & Wintemute, *The Epidemiology of Firearm Suicide in the United States*, 79 J. Urban Health 39, 47 (2002). More than 90% of all suicide attempts with a firearm, if serious enough to require hospital treatment, result in death; suicide attempts by drug poisoning, by comparison, carry only a 2% fatality rate.[8]

Reducing the impulsive use of firearms is thus an eminently reasonable policy determination that is "fairly support[ed]" by the evidence (which need not be conclusive to uphold the law). *Jackson*, 746 F.3d at 969. Indeed, a rigorous empirical study revealed a high correlation between state waiting-period laws and a reduction in suicides by older Americans, the demographic group most likely to commit suicide with a firearm. "This reduction in suicides . . . was much stronger in states that had instituted both waiting periods and background checks . . . than in states that only changed background check requirements." Ludwig & Cook, *Homicide & Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 J. Am. Med. Ass'n 585, 585 (2000), *also at* EOR 254.

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[8] *See* U.S. Centers for Disease Control & Prevention, Injury Statistics Query & Reporting System, http://1.usa.gov/1ni8EV8.

For the better part of the 20th century, this rationale was uncontroversial. As late as the 1970s, the NRA supported a weeklong waiting period for precisely this reason, explaining that laws like California's "help in reducing crimes of passion." Winkler, *Gunfight* 70. This was also a basis for President Reagan's support of a national waiting period. Drawing on California's long experience, Reagan understood that "since many handguns are acquired in the heat of passion (to settle a quarrel, for example) or at times of depression brought on by potential suicide," requiring a purchaser to wait a week or two before receiving the firearm provides "a cooling-off period" that has "the effect of reducing the number of handgun deaths." Reagan, *Why I'm for the Brady Bill*.

3. *Straw Purchases*. Finally, California's law helps reduce straw purchases—that is, purchases made by one person on behalf of another prohibited purchaser. Without the ten-day waiting period, according to the trial testimony of an official at California's Bureau of Firearms, "many more straw purchases would be completed, and the firearms would have to be retrieved from the prohibited (and, likely, dangerous) people." AG Br. 12. To prevent this result and ensure sufficient time to investigate such purchases—which may include "review[ing] paperwork at gun shops" and "observ[ing] behavior and interactions at gun shows," EOR 49—California reasonably decided to impose a ten-day waiting period. This Court should not disturb that considered legislative judgment.

* * * *

In holding that California's waiting period fails intermediate scrutiny, the district court also implicitly concluded that the law burdens Second Amendment conduct "substantially more" than necessary to further the State's interest. *See Turner*, 520 U.S. at 185; EOR 41. But, particularly as applied to those who already own firearms, any burden imposed by a ten-day waiting period is *not* substantial. As the historical record laid out here demonstrates, California's waiting period is a longstanding regulation of the type deemed presumptively lawful by the Supreme Court in *Heller*. And for the first three-quarters of the 20th century, it was a law with a broad national consensus behind it: even the nation's leading gun-rights organization recognized that waiting periods "adequately protect[] citizens of good character" and have "not proved to be an undue burden on the shooter and sportsman." Webber, *Where the NRA Stands*, at 23. Because that recognition remains as true today as it was then—especially as applied to those who already have access to guns for self-defense—California's waiting period does not violate the Second Amendment.

CONCLUSION

The district court's judgment should be reversed in its entirety.

Respectfully submitted,

/s/ Deepak Gupta

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 6,913 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

April 1, 2015

Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015, I electronically filed the foregoing Brief of *Amicus Curiae* Everytown for Gun Safety in Support of Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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