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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF CALIFORNIA

10 KIM RHODE, et al.,

11 Plaintiffs,

12 v.

13 XAVIER BECERRA, in his official
14 capacity as Attorney General of the State
of California,

15 Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**SUPPLEMENTAL BRIEF IN
SUPPORT OF PLAINTIFFS’
MOTION FOR PRELIMINARY
INJUNCTION**

Judge: Hon. Roger T. Benitez
Courtroom: 5A

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BACKGROUND

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2 At the hearing on Plaintiffs’ Motion for Preliminary Injunction, the Court deferred
3 its ruling on the motion and ordered the State to disclose to Plaintiffs information about
4 individuals who had been either “rejected” or “denied” ammunition purchases during July
5 and August 2019.¹ Tr. of Proceedings at 133:6-135:21, Aug. 19, 2019. Essentially, the
6 State was to provide documentation of the (1) reasons for and rates of *rejections*, (2) rate
7 of those *rejected* who have since been able to purchase ammunition, and (3) reasons for
8 *denials*, including wrongful ones for people who DOJ had incorrectly determined to be
9 legally ineligible. *Id.* at 133:11-25.

10 In compliance with the Court’s order, the State filed the Supplemental Declaration
11 of Mayra G. Morales in Support of Defendant Xavier Becerra’s Opposition to Plaintiffs’
12 Motion for Preliminary Injunction. Morales Decl. Supp. Opp’n Pls.’ Mot. Prelim. Inj.
13 (“Suppl. Morales Decl.”), Aug. 27, 2019, ECF No. 42. At the same time, the State
14 provided Plaintiffs with Excel spreadsheets containing the figures on which the State
15 claims it based the information presented in the supplemental declaration.

16 On October 1, 2019, the parties participated in a telephonic status conference,
17 during which the Court ordered the State to disclose to Plaintiffs the same information
18 from July and August it had provided in the supplemental declaration, but for September
19 and October. The Court also invited Plaintiffs to file this supplemental brief, explaining
20 their view of the information the State disclosed in its supplemental declaration and its
21 impact on their motion. The Court then ordered the parties to participate in another
22 telephonic status conference on November 15, 2019, and suggested that it might hold an
23 evidentiary hearing before ruling on Plaintiffs’ motion.

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27 ¹ Plaintiffs understand the difference between “rejected” and “denied” is that the
28 former describes those who lack required information in DOJ’s system to complete a
background check, while the latter describes those legally prohibited from possessing
ammunition.

SUMMATION OF ARGUMENT

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2 The State’s supplemental declaration provides all the evidence this Court needs to
3 preliminarily enjoin the challenged provisions. It confirms that around 20% of people
4 seeking to purchase ammunition are prevented from doing so for an indefinite amount of
5 time, not for being legally ineligible to possess ammunition, but because their records are
6 not to the State’s liking. And, when rejected, the State offers no specific explanation of the
7 reason for the rejection or the process to remedy it. While some of those who were
8 rejected resolve issues with their records in hours to days, the State cannot dispute that
9 some may need weeks or months to do so, assuming they are able to at all. To that point, a
10 clear majority of those rejected in July and August (60-70%) did not successfully purchase
11 ammunition by the end of August. Others are denied because DOJ wrongly considers
12 them prohibited. These problems are so prevalent that California alerted hunters that they
13 “may have difficulty purchasing ammunition” and advised them to do so with time to
14 spare for such a contingency. Req. Jud. Ntc. Supp. Suppl. Br. Pls.’ Mot. Prelim. Inj. ¶ 1.

15 Not only do these undisputed facts raise serious doubts about whether the System
16 furthers the State’s interests at all, they confirm that it burdens far too much protected
17 activity to be a reasonable “fit” under heightened scrutiny. What’s more, these problems
18 with the System are in addition to the identification and delay issues raised in Plaintiffs’
19 motion briefing. Pls.’ Mem. Supp. Mot. Prelim. Inj. (“Mot.”) at 7, 10-11, 14, 17-19; Reply
20 to Def.’s Opp’n to Pls.’ Mot. Prelim. Inj. (“Reply”) at 5-7. And purchasers seeking to
21 acquire ammunition from an out-of-state seller not only face these burdens, but also the
22 discretion of in-state vendors over whether they can even acquire the ammunition and at
23 what cost, in violation of the dormant Commerce Clause. Mot. 20-23; Reply 7-8.

24 The parties largely do not dispute facts but rather the legal implications of the facts.
25 Thus, neither the November 15 status conference nor an evidentiary hearing is necessary.
26 Respectfully, the Court can and should decide Plaintiffs’ motion on this record. Because
27 facts in that record, as even the State relates them, show Plaintiffs are likely to succeed on
28 the merits and that the System inflicts irreparable harm, the Court should grant the motion.

ANALYSIS

I. AMMUNITION PURCHASE REJECTION RATE

Reports of problematic ammunition purchase rejection rates following the launch of the ammunition background check system (the “System”) were among the main reasons Plaintiffs sought a preliminary injunction. Mot. at 9, 15. Lacking access to any hard numbers on the prevalence of rejections, Plaintiffs had to rely on accounts from vendors to describe the problem. *Id.* In opposing Plaintiffs’ motion, however, the State provided those numbers and removed any doubt that the rejection rate for July was high by any measure, being around 20%. Decl. Mayra G. Morales Supp. Def.’s Opp’n Pls.’s Mot. Prelim. Inj. (“Morales Decl.”) ¶¶ 49-52. Plaintiffs still believe, as they did when filing the motion, that such an excessive rejection rate is constitutionally fatal. Mot. 15, 18; Reply 5.

In deferring its ruling on Plaintiffs’ motion, this Court—perhaps wanting more time to pass to see whether that rate would decrease or was inherent in the background check system—ordered the State to provide Plaintiffs with details about people who had been rejected or denied. The State complied and, according to its most recent figures, the rejection rate in August remains virtually unchanged from July. Suppl. Morales Decl. ¶¶ 17, 26 (tbls. 1.3, 2.1). This outcome suggests that the high rejection rate is inherent in the System. Issuance of an injunction is thus warranted.

A. AFS Checks

AFS Checks had a rejection rate around 20% in July. That rate held steady in August, up about 1.2% from July. *Id.* ¶ 26 (tbl. 2.1). The State suggests that rate is artificially inflated because 30% of those rejected “appear” to have used an AFS Check without having the necessary AFS record to do so. *Id.* ¶¶ 2, 9. Plaintiffs cannot confirm that figure. But, even if accurate, it highlights a flaw in the System. If people do not already possess their AFS record, the State does not inform them whether they have a sufficient AFS record—or one at all—at the time of purchase. So, people must essentially guess whether they qualify for an AFS Check.

The State has determined that the remaining 70% of people rejected under an AFS

1 Check have AFS records, but there are trivial issues with those records. These issues
 2 could be an old address, a different name (perhaps a legal name change or the simple
 3 presence or absence of an affix or middle name or initial), or date of birth or ID number
 4 mismatches. *Id.* ¶¶ 9-10.² By noting the reasons these people were rejected, the State
 5 tacitly admits that it knows who they are, that they have an AFS record, and that they are
 6 not prohibited persons. But the State *still* rejects them indefinitely simply because of these
 7 clerical discrepancies. People should not be denied the exercise of their rights, even if
 8 temporarily, based on such trivialities.

9 **B. Basic Checks**

10 Basic Checks appear to continue to have a far less significant rejection rate than
 11 AFS Checks. But about one percent of purchasers who underwent a Basic Check in July
 12 and August were rejected for what appear to be the same trivial clerical discrepancies that
 13 plague the AFS Checks and which do not justify the denial of fundamental rights. *Id.* ¶ 4.

14 **C. Certificate of Eligibility (“COE”) Verification Checks**

15 While previously providing figures for COE Verification Check rejections, Morales
 16 Decl. ¶ 11, the State provides no mention of those figures for August in its supplemental
 17 declaration. The original declaration showed that around one out of every eight people
 18 (about 12%) who used the COE Verification Check option were rejected. *Id.* ¶ 51. COE
 19 holders should have zero rejections or, at least rare ones. As Plaintiffs have explained, to
 20 obtain a COE, a person must have taken extra steps with the State, including submitting to
 21 an extensive background check and fingerprinting, to establish that they are eligible to
 22 purchase *firearms*, Req. Jud. Notice, Ex. 32. A COE is automatically revoked if its holder
 23 later becomes prohibited from firearm ownership. *See* Req. Jud. Ntc. Supp. Def.’s Mot.

24
 25 ² The State also identifies “[a] small number of purchasers [who] had AFS entries,
 26 but those entries were no longer valid because the purchaser had transferred the firearm
 27 associated with the entry to someone else.” Suppl. Morales Decl. ¶ 31. But the State fails
 28 to explain why such an AFS entry would not be suitable for an AFS Check. The point of
 looking to AFS is to confirm the person has previously undergone a full background
 check. Whether the person is the current owner of the firearm in the AFS record is
 irrelevant for purposes of the AFS Check, as far as Plaintiffs can tell.

1 Dismiss First Am. Compl. ¶ 4. The State provides no justification for such a high rejection
 2 rate among COE holders, who have been pre-vetted and who are associated with a unique
 3 identifying number.³ If that rejection rate remains constant, this is perhaps the strongest
 4 evidence that the System is inherently flawed.

5 **II. REMEDIATION OF REASON FOR REJECTION**

6 The State identifies four courses of action a person who is rejected under an AFS
 7 Check can take to overcome the rejection. Each supports Plaintiffs' view that the System
 8 is constitutionally offensive and should be immediately enjoined.

9 **First**, the State says that "in many scenarios the person may use the California
 10 Firearms Application Reporting System (CFARS) to update their personal information."
 11 Suppl. Morales Decl. ¶ 6. The State explains that those whose current address does not
 12 match their AFS records can log into CFARS and apply to update their AFS records with
 13 their current address, which "if a match is found in [AFS] . . . may take less than 10
 14 minutes" for DOJ to update, "but depending on the number of pending applications, may
 15 take longer." Morales Decl. ¶ 21. Those needing to update an AFS record for changes to a
 16 name, identification number, or date of birth can also do so through CFARS; the process
 17 "may take a few hours, but depending on [DOJ] workload, can take several days
 18 (excluding weekends) . . ." *Id.* ¶ 22. The reasons for the rejections and delays as the State
 19 describes them are unacceptable. But the System is even worse than the State's depiction.

20 To begin with, the State does not explain what people who do not fall within the
 21 "many scenarios" where CFARS can be used to update their AFS record are supposed to
 22 do. Even in the instances in which CFARS may be used to fix records, people must know
 23 they can do so. But no mechanism is in place to make sure that prospective purchasers
 24 know about CFARS, let alone how to use the complicated system. *See Id.* ¶ 20. They must
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26
 27 ³ The State suggests that the figures for people who did not pass the COE
 28 Verification Check could include denials. Morales Decl. ¶ 11. Setting aside the problems
 with the State's denial figures generally discussed below in Part III, Plaintiffs doubt that a
 COE holder could be a prohibited person because of the nature of the COE system.

1 either rely on the vendor to explain it to them—which the vendor has no obligation to do
2 or may not even know—or take it upon themselves to figure it out by research.

3 The State also grossly understates the time it can take to correct an AFS record.
4 While it may take DOJ just 10 minutes to update an address in an AFS record, the State
5 does not explain how long it takes for it to actually get around to updating it. *Id.* ¶ 21. It
6 can take well over a week. Decl. Nandu Ionescu Supp. Pls.’ Mot. Prelim. Inj. (“Ionescu
7 Decl.”) ¶ 10. The same is true for other AFS records. DOJ *can* update them in “a few
8 hours” or “several days” but admits that it does not know how long it could take. Tr. of
9 Proceedings at 18:25-19:1-5, 20:8-23, Oct. 1, 2019. Even if that were the case, a several-
10 day-wait is unnecessarily excessive; particularly when the law says a background check
11 “approval shall occur at the time of purchase or transfer.” Cal. Penal Code § 30370. So
12 when the State claims that “people may use CFARS to correct their AFS information in a
13 relatively short amount of time,” that is not necessarily the case. Suppl. Morales Decl. ¶ 8.

14 What’s more, and perhaps most problematic, the State does not even provide a
15 specific explanation of the reason for a rejection. Rejected purchasers are told only that
16 their transaction has been rejected or denied and provided with a number “that can be used
17 to obtain the reason for the rejection through [DOJ’s] CFARS website.” Tr. of
18 Proceedings at 18:11-24, Oct. 1, 2019; Cal. Code Regs. tit. 11, § 4302(e). Assuming they
19 even learn from the vendor or through personal research about CFARS, that system does
20 not explain the specific reason for a rejection either. It merely provides a boilerplate
21 explanation that either the person has no AFS record or there is *some* discrepancy between
22 the person’s existing AFS record and current personal information. Ionescu Decl. ¶¶ 4, 7,
23 9. And calling DOJ for assistance is generally futile; its staff will not explain to people
24 why they have been rejected. At best, the staff will give examples of what could be wrong
25 with the person’s record and direct how to address hypothetical issues. Decl. William D.
26 Shepard Supp. Pls.’ Mot. Prelim. Inj. (“Shepard Decl.”) ¶ 4-7. So people need to either
27 figure out why they were rejected on their own or double down on the gamble by trying
28 another type of background check, each of which comes with its own problems, including

1 a risk of rejection, as explained further below. *See infra* p. 8.

2 To update an AFS record through CFARS, people must know the contents of at
3 least one of their existing AFS records. Morales Decl. ¶ 20; Cal. Code Regs. tit. 11, §
4 4353(c). If unsure of existing AFS records, the State says that people can request a copy
5 of their records from DOJ. Morales Decl. ¶ 23. Once they have those records, they can
6 presumably see what the discrepancy is and fix the problem through CFARS. *See* Req.
7 Jud. Ntc. Supp. Pls.’ Mot. Prelim. Inj. Ex. 28. But again there is no guidance from the
8 State on what specifically needs updating. What’s more, there is no mechanism in place to
9 notify people that they can order their AFS record—they must once again rely on the
10 vendor or their own research for that information. Nor does the State explain how long it
11 takes DOJ to process AFS record requests. To Plaintiffs’ knowledge, DOJ has no
12 established timeframe for doing so. In fact, Plaintiff Johnson waited over 110 days for
13 DOJ to respond to his request for his AFS records. Decl. Edward Johnson Supp. Pl.’s Mot.
14 Prelim. Inj. (“Johnson Decl.”) ¶ 4. Plaintiffs are aware, however, of what they believe is a
15 DOJ-BOF policy that “status checks for applications [for AFS records] that are not older
16 than 90 days cannot be provided.” Shepard Decl. ¶ 10. In sum, fixing AFS records can
17 take a significant amount of time, potentially months, during which people waiting for the
18 fix cannot exercise their constitutional right to purchase ammunition.

19 **Second**, for those who own a firearm that has no AFS record, the State explains that
20 they may submit to DOJ a Firearms Owner Report along with a \$19 fee to create an AFS
21 record. Suppl. Morales Decl. ¶ 6. The State says that “[o]nce the report is processed and
22 approved” the person will have an AFS entry that can be used to buy ammunition through
23 an AFS Check. *Id.* Setting aside that this adds another fee for a background check, the
24 State yet again fails to explain how long this process and approval will even take. There is
25 no statutory or regulatory deadline. It is thus an indefinite—and thus unacceptable—delay.

26 The **third** option the State offers prospective ammunition purchasers is to buy a
27 new firearm, which would create an AFS record that can be used for an AFS Check. *Id.*
28 This is not only a costly option, but the ammunition cannot be delivered for at least 10

1 days, along with the firearm. Cal. Code Regs. tit. 11, § 4304; *see also* Cal. Penal Code §
 2 27540. This is both an undue burden for existing firearm owners, and an unacceptable
 3 barrier to entry for those who merely seek to obtain ammunition to learn about firearms by
 4 attending a training course or learning to shoot with more experienced people.

5 **Finally**, the fourth option is to undergo either the full-scale Basic Check—which
 6 requires payment of \$19 and an average wait of almost two days, Suppl. Morales Decl. ¶¶
 7 3-5⁴—or obtain a COE, which can take months to obtain and comes with a price tag of
 8 around \$100. *See* Mot. 6-7. These options are also both unacceptable burdens on current
 9 gun owners and barriers to entry for people considering entering the world of firearm
 10 ownership or familiarity. What’s more, as with rejections under the AFS Check option,
 11 the State again fails to explain specifically why people *rejected* under the Basic Check or
 12 the COE Verification Check systems—who are by definition not legally prohibited from
 13 acquiring ammunition—were rejected. Nor does the State explain how they are supposed
 14 to remedy the reason for their rejection. While this is a less prevalent problem than AFS
 15 Check rejections, the State does not purport to have a recourse for these people, which
 16 account for *at least* 236 cases in July and August alone. Suppl. Morales Decl. ¶ 15 (tbl.
 17 1.1); Morales Decl. ¶ 51 (not accounting for COE Verification Check rejections for
 18 August because the State did not provide them). A system that denies people exercise of
 19 their rights and leaves them unaided in remedying the cause of their denial simply cannot
 20 be constitutionally sound.

21 The State claims that 30-40% of people rejected by AFS Checks in July or August
 22 were able to purchase ammunition at some point before August 31, 2019. Suppl. Morales
 23 Decl. ¶ 7. Plaintiffs have no way to verify that claim. But, even if true, it means the State
 24 admits that a significant majority (60-70%) of non-prohibited persons who were rejected
 25 _____

26 ⁴ What’s more, undergoing a Basic Check does not create an AFS record. *See* Cal.
 27 Penal Code § 11106. Those without an AFS record must pay \$19 and wait hours to days
 28 *every time* they purchase ammunition. The State explains this is because AFS is based on
 a firearm purchase and a Basic Check is not. Tr. of Proceedings at 31:22-32:1-14, Oct. 1,
 2019. But the State does not explain why such limitation is necessary.

1 ammunition purchases over the course of two months under the AFS Check system had
 2 not remedied their situation. What’s more, the State offers no evidence about whether any
 3 of the at least 236 non-prohibited persons rejected under the Basic Check or COE
 4 Verification Check systems subsequently fixed the cause of their rejection and acquired
 5 ammunition. It must be assumed those people remain in limbo. Such a rate of attrition
 6 would never be tolerated in the context of any other constitutional right.

7 **III. DENIALS INCLUDE MANY *NON-PROHIBITED* PERSONS**

8 According to the State, in July and August 289 people were “denied” ammunition
 9 purchases. Suppl. Morales Decl. ¶¶ 41-42. The State says it reviewed “approximately 45”
 10 of those 289 individuals to confirm whether they were proper denials. *Id.* ¶ 45. That
 11 review resulted in the State finding that nine of those denied—or 20%—were *not*
 12 prohibited persons. In other words, they were wrongly denied. *Id.*⁵ If that is representative
 13 of the entire class of people denied, that means about 58 people were wrongly denied.

14 But the number of wrongly denied people could be significantly higher. The State
 15 reveals that it will *deny* (not just reject) a purchase if DOJ cannot determine whether the
 16 person is prohibited. *Id.* ¶ 15 n.2 (“[I]f the Department is unable to obtain the information
 17 [necessary to determine whether a purchaser is prohibited] it will ultimately deny the
 18 transaction because an eligibility determination could not be made.”) Not only does this
 19 raise the question of how many of the people DOJ has denied fall into that camp, but it
 20 proves that such a system is an inappropriate gatekeeper to the exercise of a fundamental
 21 right. It is the government’s burden to prove that an individual should be denied the
 22 exercise of a right. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). This
 23 system has that burden exactly backwards, denying people the exercise of a right and
 24 placing the burden on them to prove to the government they are entitled to exercise it.

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 28 ⁵ It is unclear whether the State subsequently notified any of those individuals that they are eligible for ammunition purchases. Without confirmation that they have been notified, those people, practically speaking, remain wrongly denied.

1 **IV. NON-RESIDENT RESTRICTIONS**

2 Finally, according to the State, non-residents can only utilize the COE Verification
3 Check to be able to purchase ammunition while in California. Req. Jud. Ntc. Ex. 12
4 (Attachment A- Public Comments and Department of Justice Responses, DOJ Response
5 to Summarized Comment # 67b). The State has provided no information about how many
6 non-residents have purchased ammunition from a licensed California vendor since July 1,
7 2019—the date the background check requirement took effect. Cal. Penal Code §
8 30370(a). As Plaintiffs have argued, this is effectively a ban on non-residents purchasing
9 ammunition while present in California. Mot. 17-18. Without proof that non-residents are
10 successfully purchasing ammunition in-state, this consequence of the State’s background
11 check system alone is enough to warrant its being enjoined as unconstitutional.

12 **CONCLUSION**

13 Factual disputes are not a significant issue in this matter. The parties may quibble
14 on details. But they agree that: (1) the System rejects 20% of ammunition purchasers; (2)
15 the State does not directly inform those rejected of the specific reason for the rejection or
16 how to remedy it; (3) there are no established timeframes for DOJ to update AFS records
17 that would allow a rejected person to purchase ammunition; (4) according to the most
18 recent data, a majority of those rejected do not later successfully acquire ammunition; (5)
19 DOJ *denies* people whose eligibility status it cannot determine; and (6) DOJ has denied
20 purchases to people who were later found to not be prohibited. For these reasons,
21 Plaintiffs respectfully believe that neither the scheduled November 15 status conference
22 nor an evidentiary hearing is necessary to rule on their preliminary injunction motion. The
23 Court should grant that motion on the current record at its earliest convenience.

24
25 Dated: October 29, 2019

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