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15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION
17

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

22 Plaintiffs,

23 v.

24 KAMALA HARRIS, Attorney
General of California (in her official
25 capacity), and DOES 1 to 20,

26 Defendants.
27
28

Case No. 1:11-cv-02137-AWI-SKO
Honorable Anthony W. Ishii

**APPLICATION OF BRADY
CENTER TO PREVENT GUN
VIOLENCE FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE***

Complaint filed: 12/23/2011

Dept: 8th Flr., Crtrm. 2
Judge: The Hon. Anthony W. Ishii
Trial Date: March 25, 2014

1 Through the undersigned counsel, the Brady Center to Prevent Gun Violence
2 (the “Brady Center”) hereby applies to the Court for leave to file a brief as *amicus*
3 *curiae* in this case for the facts and reasons stated below. The proposed brief is
4 attached hereto as Exhibit A for the convenience of the Court and counsel.
5 Defendant consents to the filing of this *amicus* brief. Plaintiffs have indicated that
6 they do not consent to the filing of this *amicus* brief.

7 The Brady Center is the nation’s largest non-partisan, non-profit organization
8 dedicated to reducing gun violence through education, research, and legal
9 advocacy. Through its Legal Action Project, the Brady Center has filed numerous
10 briefs as *amicus curiae* in cases involving challenges to both state and federal gun
11 laws.

12 District courts have inherent power to grant third parties leave to file briefs as
13 *amici curiae*, particularly regarding “legal issues that have potential ramifications
14 beyond the parties involved or if the [*amicus* has] unique information or perspective
15 that can help the court beyond the help that the lawyers for the parties are able to
16 provide.” *NGV Gaming, Ltd. V. Upstream Point Molate, LLC*, 335 F. Supp. 2d
17 1061, 1067 (N.D. Cal. 2005) (internal quotations omitted). Here, *amicus* brings a
18 broad and deep perspective to the issues raised by this case and has a compelling
19 interest in the federal courts’ interpretation of Second Amendment issues. *Amicus*
20 thus respectfully submits the attached brief to assist the Court with the
21 constitutional issues in this case, including important matters of first impression
22 under the Second Amendment.

23 The proposed brief explores the scope of the Second Amendment, and
24 Plaintiffs’ arguments regarding the supposed burden of California Penal Code
25 sections 26815 and 27540 (the “Waiting-Period Law”) as it applies to repeat
26 purchasers of firearms. The brief concludes that (1) the Waiting-Period Law does
27 not burden conduct protected by the Second Amendment; (2) the burden on
28 protected conduct, if any, is minimal; and (3) the Waiting-Period Law is an

1 important element of California's comprehensive gun control scheme. *Amicus*,
2 therefore, respectfully submits the attached brief to assist the Court as it considers
3 the significant issues raised in this matter.

4 For the foregoing reasons, the Brady Center respectfully requests that the
5 Court grant leave to file the attached *amicus* brief.

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Dated: July 21, 2014

By: /s/ Neil R. O'Hanlon

Neil R. O'Hanlon
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Attorneys for *Amicus Curiae* Brady
Center to Prevent Gun Violence

EXHIBIT A

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BRADY CENTER TO PREVENT
GUN VIOLENCE**

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CORPORATE DISCLOSURE STATEMENT

The Brady Center to Prevent Gun Violence states that it has no parent corporations, nor has it issued shares or debt securities to the public. The Brady Center to Prevent Gun Violence is a § 501(c)(3) non-profit corporation, and no publicly held corporation holds ten percent of its stock.

/s/ Neil R. O'Hanlon
Neil R. O'Hanlon

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1 The Brady Center to Prevent Gun Violence (“The Brady Center”) hereby
2 respectfully submits this brief as *amicus curiae* in support of defendant Kamala
3 Harris, in her official capacity as Attorney General of California, in the above-
4 referenced matter.

5 **I. INTRODUCTION**

6 The Supreme Court held that the Second Amendment protects “an individual
7 right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595
8 (2008). However, it does not guarantee that individuals will have immediate access
9 to an unlimited cache of firearms at *all* times. Plaintiffs’ desire to bolster their
10 arsenals does not implicate the Second Amendment because no Court has
11 interpreted the Second Amendment to protect an individual’s right to acquire as
12 many firearms as they desire. This Court should not be first to expand the Second
13 Amendment to encompass arsenal building.

14 Plaintiffs Jeff Silvester and Brandon Combs (“Plaintiffs”), owners of
15 multiple firearms, have, by their own admission, been keeping and bearing arms for
16 years. Since several of their firearm acquisitions have occurred in California,
17 Plaintiffs – on several occasions – have gone through the 10-day waiting period
18 between the purchase and possession of a firearm (and the attendant background
19 check) as required by California Penal Code sections 26815 and 27540 (the
20 “Waiting-Period Law”). Plaintiffs wish to add more firearms to their arsenal, and
21 Plaintiffs do not contend that California law prevents them from doing so. Instead,
22 Plaintiffs argue that because they own firearms and have been subject to the
23 Waiting-Period Law on several occasions, putting them through the 10-day waiting
24 period again would violate the Second Amendment.

25 Plaintiffs’ novel interpretation of the Second Amendment – which would
26 guarantee existing gun owners, but not first-time buyers, *instant* access to new
27 firearms – has *no legal or factual basis*. First, no court has ever held that the
28 Second Amendment guarantees instant access – or any manner of access – to an

1 arsenal of firearms. Second, there is no violation of the right to bear arms in
2 defense of “hearth and home” that was recognized in *Heller*, because Plaintiffs have
3 offered no evidence to establish that their current arsenals are insufficient for that
4 purpose. Third, there is insufficient evidence to support Plaintiffs’ theory that
5 repeat gun purchasers are more trustworthy than first-time buyers, and should
6 therefore be afforded preferential treatment. Finally, to the extent the Waiting-
7 Period Law impacts Plaintiffs’ Second Amendment rights, the impact – a mere 10-
8 day administrative delay – is minimal in relation to the State’s paramount interest in
9 ensuring that all gun purchasers are properly qualified. For these reasons, the
10 Brady Center respectfully submits that the Court should reject Plaintiffs’ challenge
11 to the Waiting-Period Law.

12 **II. ARGUMENT**

13 **A. The Waiting-Period Law Does Not Burden Conduct Protected By**
14 **The Second Amendment**

15 A challenge under the Second Amendment fails where the challenged law
16 does not burden conduct protected by the Second Amendment. *See United States v.*
17 *Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (citing *United States v. Chester*, 628
18 F.3d 673, 680 (4th Cir. 2010)).¹ There is no dispute that Plaintiffs have owned
19 between six and fifteen firearms during this lawsuit. Defendant’s Opening Brief,
20 7:14-15, 8:8-9. In that connection, Plaintiffs’ challenge to the Waiting-Period Law
21 is limited to how the law is applied to persons who have guns registered to them
22 and is not a broad facial challenge. Trial transcript 5:3-6:25. By all accounts,
23 Plaintiffs have been keeping and bearing arms for years, and the Waiting-Period
24

25
26 ¹ *Chovan* established a two-part test for analyzing challenges under the Second
27 Amendment: “The Second Amendment inquiry we adopt (1) asks whether the
28 challenged law burdens conduct protected by the Second Amendment and (2) if so,
directs courts to apply an appropriate level of scrutiny.” 735 F.3d at 1136.

1 Law does not affect their ability to exercise their Second Amendment rights with
2 respect to the firearms they already own.² See Plaintiffs’ Opening Brief, 3:22-4:6.

3 The Waiting-Period Law also does not prevent Plaintiffs and other gun
4 owners from purchasing even more firearms, provided they are qualified to do so.
5 In fact, Plaintiffs could have purchased “dozens more firearms in the last two and a
6 half years” of this litigation, even with the Waiting Period Law in effect.
7 Defendants’ Opening Brief, 5:16-17. Plaintiffs do not dispute this point. Yet
8 Plaintiffs contend that California’s 10-day waiting period imposes an unacceptable
9 – indeed, unconstitutional – burden on their Second Amendment rights. In essence,
10 Plaintiffs seem to believe that, despite the fact that there is no interference in their
11 right to keep and bear the arms they already own, the Second Amendment
12 guarantees that they will have nearly instant access to as many new firearms as
13 possible. However, Plaintiffs have not, and cannot, cite any authority supporting
14 such a novel interpretation of the Second Amendment.

15 Plaintiffs’ reliance on *Heller* is misplaced, because neither *Heller* nor any of
16 the decisions that interpret it hold that the Second Amendment guarantees the right
17 to certain types of firearms or that an individual has the right to amass an arsenal.
18 In addition to recognizing that the Second Amendment applies to individuals,
19 *Heller* acknowledged that at the core of the Second Amendment is the right of
20 “law-abiding, responsible citizens to use arms in defense of hearth and home.”
21 Plaintiffs’ Opening Brief, 6:14-16. Since Plaintiffs already own multiple firearms,
22 Plaintiffs argue that they must have immediate access to additional guns, because
23 under *Heller*, their existing arsenals are somehow unsuitable for defending “hearth
24 and home.” *Id.* at 5:14-16 (“a firearm possessed for one purpose, such as target
25 practice, hunting, or collecting, may be completely unsuitable for self-defense in
26

27 ² Mr. Silvester also has a license to carry a loaded handgun in public, and Mr.
28 Combs has a Certificate of Eligibility certifying his suitability to acquire and
possess firearms. Plaintiffs’ Opening Brief, 3:22-4:6.

1 the home or to be carried in public”). Notably, no Court has interpreted *Heller* to
2 grant individuals the right to keep and bear a certain number, or particular types, of
3 firearms, and there is no basis for such an extension. Plaintiffs have not proffered
4 any evidence showing that they are incapable of defending their homes with their
5 current weapons, or that the firearms they wish to acquire are superior in that
6 regard. Without such evidence, likely in the form of expert testimony, there is no
7 basis on which the Court can determine the efficacy of certain firearms for certain
8 purposes. No court has recognized an individual’s preference to have an additional
9 firearm as deserving Constitutional protection.

10 Likewise, there is no support for Plaintiffs’ contention that existing gun
11 owners are, or should be, afforded more rights under the Second Amendment than
12 prospective gun buyers. Plaintiffs concede that the Waiting-Period Law “may be
13 appropriate” for first-time gun buyers in order to prevent “*impulsive violent acts*
14 and because they are strangers to California’s ‘gun-owner database.’” Plaintiffs’
15 Responsive Trial Brief, 1:16-18 (emphasis added). According to Plaintiffs,
16 however, gun purchasers who already own firearms, have a Certificate of
17 Eligibility, and/or have a concealed-carry license cannot be subject to the Waiting-
18 Period Law because they “are known by the state to be trustworthy.” *Id.* at 1:18-20.
19 However, there is no basis for the argument that existing gun owners are inherently
20 trustworthy, or are less prone to “impulsive violent acts.” Plaintiffs also fail to
21 account for the fact that a gun owner’s eligibility to purchase more firearms may
22 have changed since his or her last purchase, and the waiting period would be
23 necessary to allow the State to discovery such information. As such, there is simply
24 no reason to treat first-time and repeat gun purchasers differently. If the Waiting-
25 Period Law can deter violent acts of first-time gun buyers, there is no reason to
26 doubt its potential beneficial effect on all purchasers.

1 For the foregoing reasons, the Waiting-Period Law does not burden any
2 conduct that is protected by the Second Amendment, and on that basis alone,
3 Plaintiffs' challenge fails under the *Chovan* test.

4 **B. The Burden On Protected Conduct, If Any, Is Minimal**

5 Even if the Court finds that the Waiting-Period Law burdens protected
6 conduct, the burden is minimal at best. While Plaintiffs refer to this law as a "ban"
7 on the acquisition and ownership of new firearms (*see* Plaintiffs' Opening Brief,
8 1:12), Plaintiffs cannot earnestly defend such a label. The Waiting-Period Law
9 merely provides a 10-day administrative delay between purchase and possession.
10 During that period, while Plaintiffs cannot yet take possession of the firearm they
11 just purchased, they can still exercise their right to keep and bear the firearms they
12 already own.

13 While this brief delay may be inconvenient to Plaintiffs under certain
14 circumstances (e.g., where they want to buy a firearm that is only available at a
15 store in southern California, rather than the firearms that are readily available near
16 their homes), and may deprive them of a coveted new make or model for a short
17 period of time, this inconvenience is a result of Plaintiffs' choice to pursue a certain
18 type of firearm. *See* Defendant's Opening Brief, 7:23-8:3. This is clearly different
19 from *Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011), where a city
20 ordinance that required fire-range training as a prerequisite to gun ownership, yet
21 prohibited all firing ranges in the city, effectively forced gun purchasers out of the
22 city. Plaintiffs' choice to travel in order to buy firearms cannot result in a violation
23 of the Second Amendment.

24 Any minimal inconvenience to Plaintiffs is overwhelmed by the State's
25 interest in ensuring that all purchasers of firearms are properly qualified. Plaintiffs
26 implicitly recognize that the Waiting Period Law accomplishes this purpose by
27 conceding it should apply to first-time buyers. Plaintiffs' Responsive Trial Brief,
28 1:16-18.

1 **C. The Waiting-Period Law is an Important Element of California’s**
2 **Comprehensive Gun Violence Prevention Regulatory Scheme**

3 Recent studies show a correlation between California’s gun violence
4 prevention regulations and the State’s reduction in gun deaths that has outpaced the
5 national average. Between 1990 and 2010, California’s firearm homicide rate
6 declined by 53.9% (versus 37.3% nationwide), and the firearm suicide rate dropped
7 47.3% (versus 16.9% nationally). *See* Dix, G., “A Comparison of Firearm
8 Mortality Rates in California and the Rest of the Nation 1990-2010,” p.1, Jan. 9,
9 2013. *See also* Law Center to Prevent Gun Violence, “The California Model:
10 Twenty Years of Putting Safety First,” p.4, June 18, 2013 (*available at*
11 [http://smartgunlaws.org/wp-content/uploads/2013/07/20YearsofSuccess_For](http://smartgunlaws.org/wp-content/uploads/2013/07/20YearsofSuccess_ForWebFINAL3.pdf)
12 [WebFINAL3.pdf](http://smartgunlaws.org/wp-content/uploads/2013/07/20YearsofSuccess_ForWebFINAL3.pdf)). Since 1993, California’s firearm homicide rate has declined by
13 64%, compared to a 42% decrease nationwide. Dix, p.1.

14 This sharp decline in gun violence occurred while California was
15 strengthening its gun regulations, including enacting new requirements for gun
16 safety, restrictions on the frequency of handgun purchases, and prohibitions on the
17 sale of large capacity ammunition magazines. “The California Model,” p.5. The
18 Waiting-Period Law is part of California’s comprehensive gun violence prevention
19 scheme that many believe has played an important role in reducing firearm deaths
20 in California, which have been declining much faster than non-firearm homicides
21 and suicides. Dix, p.4. If Plaintiffs are permitted to extract the Waiting-Period
22 Law from California’s regulatory scheme, there is a risk of reversing some of the
23 progress that has been made.

24 The statistics agree: states with waiting-period laws like California’s have, on
25 average, some of the lowest firearm death rates in the country: California (42nd),
26 Hawaii (50th), Illinois (38th), Rhode Island (48th), Minnesota (43rd), Florida
27 (21st), Iowa (43rd), Maryland (34th), New Jersey (46th), and Wisconsin (37th).
28 LCPGV, “Waiting Periods Policy Summary,” June 24, 2013 (*available at*

1 [http://smartgunlaws.org/waiting-periods-policy-summary/ #identifier_14_5825](http://smartgunlaws.org/waiting-periods-policy-summary/#identifier_14_5825));
2 Henry J. Kaiser Family Foundation, “Number of Deaths Due to Injury by Firearms
3 per 100,000 Population,” 2010 (*available at* [http://kff.org/ other/state-indicator](http://kff.org/other/state-indicator/firearms-death-rate-per-100000/)
4 [/firearms-death-rate-per-100000/](http://kff.org/other/state-indicator/firearms-death-rate-per-100000/)).

5 In contrast, the states with the 10 highest firearm death rates require no
6 waiting period between the purchase and possession of firearms: Alaska (1st),
7 Louisiana (2nd), Alabama (3rd), Mississippi (4th), Wyoming (5th), Montana (6th),
8 New Mexico (7th), Arizona (8th), Nevada (9th), and Arkansas (10th). LCPGV,
9 “State Waiting Periods for Guns,” Jan. 3, 2012 (*available at*
10 <http://smartgunlaws.org/category/state-waiting-periods-for-guns/>).

11 Further highlighting the need for the Waiting-Period Law, the FBI reports
12 that in 2012 alone, 3,722 firearms were transferred to ineligible persons despite the
13 use of the federal NICS system. *See* Criminal Justice Info. Svcs. Div. of the FBI,
14 U.S. Dep’t of Justice, *National Instant Criminal Background Check System (NICS)*
15 *Operations 2012* (*available at* [http://www.fbi.gov /about-us/cjis/nics/reports/2012-](http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report)
16 [operations-report](http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report)). According to the FBI, it has taken an average of **25 days**
17 “between the initial NICS inquiry and the date the FBI determined that the purchase
18 should have been denied.” U.S. General Accounting Office, *Gun Control:*
19 *Implementation of the National Instant Criminal Background Check System*, p.13
20 (Feb. 2000) (*available at* <http://www.gao.gov/new.items/g100064.pdf>). For that
21 reason, the FBI has indicated that allowing more time to complete background
22 checks would help minimize sales to ineligible persons. *Id.* The Waiting-Period
23 Law, by providing just a brief additional period to complete the background check,
24 serves that purpose as a result of the California’s legislature’s comprehensive
25 approach to preventing gun violence.

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III. CONCLUSION

In view of the foregoing, the very text of the Second Amendment – and the opinions interpreting it – demonstrate that Plaintiffs’ case lacks merit. The Waiting-Period Law should be upheld.

Dated: July 21, 2014

HOGAN LOVELLS US LLP

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